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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1963

No. 840

BYRAM CONCRETANKS, INC.,

*Petitioner,*

vs.

WARREN CONCRETE PRODUCTS CO. OF N. J., WARREN CONCRETE TANK CO. INC., VINCENT DOTOLO, RICHARD DUNKLE, PATRICK E. HIGGINS, LEONARD J. FARMER, JOSEPH W. ROGERS, HULSE MOONEY, EDISON READ, JOHN W. KLEIN, FRANK M. BERRY, EDWARD STIERLI, JOHN EVERLY, E. BLAIR JOHNSON and BOARD OF HEALTH OF ROXBURY TOWNSHIP.

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT

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## Legend

R—a refers to appendix of petitioner in the Court of Appeals.

R—b refers to joint appendix of respondents in the Court of Appeals.

When name "Warren" is used, it refers to all respondents of the Warren combine, *viz.*, Warren Concrete Products Co. of N. J., Warren Concrete Tank Co., Inc., Vincent Dotolo and Richard Dunkle.

When name "Roxbury" is used, it refers to all respondents connected with Roxbury Board of Health, *viz.*: Patrick E. Higgins, Leonard J. Farmer, Joseph W. Rogers, Hulse Mooney, Edison Read, John W. Klein, Frank M. Berry, Edward C. Stierli, John Everly, E. Blair Johnson and Board of Health of Roxbury Township.

Wb— Warren's brief in the Court of Appeals.

Rb— Roxbury's brief in the Court of Appeals.

Pb— Petitioner's brief in the Court of Appeals.

T— Transcript of proceedings.

Pp— Petitioner's petition herein.

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*To the Honorable, the Chief Justice of the United States and Associate Justices of the Supreme Court of the United States*:

This petitioner prays that a writ of *certiorari* issue to obtain review by this Court of a judgment of the United States Court of Appeals for the Third Circuit, entered on October 23, 1963, and a judgment of the said court denying a rehearing, entered on November 27, 1963.

## A. Opinions Below

There was a two page letter opinion of the United States District Court for the District of New Jersey, dated December 14, 1962 (R 7a) unreported, addressed to counsel for all parties, by the Hon. James F. Coolahan, trial Judge. This is appended hereto as Appendix "A". The Court of Appeals filed a one page *per curiam* judgment, dated October 23, 1963, reported (C. C. A. 3d, 1963), 323 F(2) 904 (see Appendix "B"). In addition, in connection with efforts to obtain pretrial discovery, in an action for mandamus, a *per curiam* opinion was filed on or about January 19, 1961, by the Court of Appeals for the Third Circuit, which was reported as *Byram Concretanks, Inc.* v. *Honorable Thomas F. Meaney,* (C. C. A. 3d, 1961), 286 F(2) 170 (Appendix "C" herewith).

## B. Jurisdiction

The judgment of the District Court was entered on December 28, 1962 (R 10a), dismissing the two causes of action and directing a verdict for defendants. On January 9, 1963 the petitioner docketed its appeal with the Court of Appeals for the Third Circuit (R 877a) (28 U.S.C.A. 1291). After the appeal was heard by the Court of Appeals, judgment was entered on October 23, 1963 affirming the judgment of the District Court.

Petition for rehearing in the Court of Appeals having been filed, judgment denying the same was entered on November 27, 1963. Upon timely application by the petitioner, pursuant to 28 U.S.C.A. 2101 and Rule 36(2) of the Rules of the United States Court of Appeals for the Third Circuit, a stay of the issuance of a mandate, originally set for January 2, 1964, was extended on January 10, 1964 by that court, to February 25, 1964.

The jurisdiction of this Court is invoked under 28 U.S. C.A. 1254(1) and under Rule 19(1)(b) of the Supreme Court of the United States.

## C. Questions Presented

1. In a suit charging conspiracy in restraint of trade and the passage of an unconstitutional ordinance as a part of such conspiracy, did the Court of Appeals err: (a) in affirming the District Court, which dismissed two causes of action and directed a verdict in favor of the defendants, when plaintiff had rested; and (b) in depriving petitioner of a jury trial, in contravention of the Seventh Amendment to the United States Constitution?

2. Did the Court of Appeals deny due process to the petitioner when it predicated affirmance of the trial court's judgment on collateral estoppel or *res judicata,* which was not the finding of the trial court, which was not in issue and which had, therefore, not been briefed or argued by either side?

3. Where petitioner contended that corruption of municipal officials was part of a conspiracy to restrain trade, did the Court of Appeals err in affirming refusal to permit petitioner discovery of cash sales of corporate respondents and discovery of personal finances of local municipal officials?

4. Did the Court of Appeals err in affirming the District Court in rulings on admissibility of evidence and in quashing *subpoena duces tecum?*

## D. Constitutional Provisions, Statutes, Court Rules, Ordinances, etc. involved

Constitution of the U. S.: Amendments V, VII and XIV.

Federal Statutes: 15 U.S.C.A. Secs. 1, 2, 7, 15, 26; 18 U.S.C.A. Sec. 709; 28 U.S.C.A. Secs. 1254(1), 1291 and 2101.

Rules of the United States Supreme Court: Rule 19(1)-(b).

Rules of the United States Court of Appeals for the Third Circuit: Rule 36(2).

Federal Rules of Civil Procedure: Rules 38, 43(a) and 50(a).

State Statutes: N.J.S.A. 58:11-25 and 58:11-33. Appendix "E".

**Miscellaneous**

Regulations: N. J. State Dept. of Health, Standards of Construction, etc., Secs. 5.1, 5.6, 5.12, 5.13 (Ex. P-16, R 401a);

Ordinance: Township of Roxbury (Ex. P-16, R 402a);

Minutes and Resolutions of Roxbury Board of Health: March 19, 1953 (Ex. P-14; R 390a), May 13, 1958 (Ex. P-17, R 404a).

Since it is not the purpose or function of this petition for *certiorari* to serve as a brief on the merits, the "miscellaneous" items are not set out herein, but reference is made to petitioner's appendix before the Court of Appeals, where such statements may be found.

## E. Statement of the Case

This is an anti-trust suit, charging conspiracy in restraint of trade, commenced in the United States District Court under 15 U.S.C.A. 1, 2, 7, 15 and 26, praying in the First Cause of Action: 1) for an injunction against the Roxbury respondents, restraining them from giving War-

ren a monopoly in the sale of concrete septic tanks[1] in Roxbury; 2) for an injunction against the Warren respondents from continuing the conspiracy in the sale of septic tanks in Roxbury and elsewhere; 3) against all the defendants, for treble the amount of damages sustained; and, in the Second Cause of Action; 4) for an injunction restraining the Roxbury respondents from interfering and discouraging petitioner and others from selling in the Roxbury market, and other rights of the petitioner under the Fifth and Fourteenth Amendments of the United States Constitution; and 5) for a court decree setting aside a resolution of March 19, 1953 adopted by the Board of Health of Roxbury and an ordinance, dated December 18, 1958, adopted by the Township of Roxbury (R 15a, *et seq.*).

Efforts to obtain pretrial discovery in the United States District Court for the District of New Jersey, that would directly link the Warren and Roxbury respondents into this conspiracy, were frustrated (discussed *infra* pp. 22). At one point, when Judge MEANEY refused to respect the order of Chief Judge SMITH, who sat on motions during the former's vacation, petitioner felt impelled to bring an action in mandamus before the Court of Appeals. That court denied the application, holding that this was a matter for review by appeal and not by mandamus; *Byram* v. *Meaney* (C.C.A. 3d, 1961), 286 F(2) 170.

Sometime before the pretrial conference, for reasons unknown to petitioner, the case theretofore assigned to Judge MEANEY was transferred to the HON. JAMES F. COOLAHAN, who sat at the trial.

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[1] A septic tank is used on realty improvements for the reception of waste, wherever the area involved is not on public sewers and constitutes a private utility regulated in the State of New Jersey, by N.J.S.A. 58:11-23, *et seq.*, as a means of avoiding water pollution.

Mr. Dotolo was subpoenaed by petitioner as an adverse witness and commanded to bring with him delivery tickets and other records which petitioner felt were necessary properly to prosecute its suit, some of which Judge MEANEY had ruled could be had at the trial. This subpoena was quashed by Judge Coolahan (R 31a, 66a).

During the trial, as the record shows, Judge COOLAHAN repeatedly and systematically excluded relevant evidence sought to be introduced on behalf of the petitioner, and otherwise harassed petitioner during the trial. At its conclusion, petitioner felt impelled to move for a mistrial, which was denied[2] (R 6a), for actions of the court during trial (see *e.g.*, R 235a, R 297a, *et seq.*). Nonetheless, the following testimony of unimpeached and uncontradicted witnesses, did get into evidence at the trial:

Petitioner, a small manufacturer (R 40a), commenced business in Mine Hill Township, Morris County, New Jersey, just outside of Roxbury Township, in 1955, and because of vandalism (T 74) moved to Route 206, Byram Township, Sussex County, New Jersey in 1957 (R 26b, 39a). It manufactures *rectangular* concrete septic tanks (Ex. P-13, R 389a), and does an intrastate business in several counties (R 43a).

The Warren respondents, admittedly the largest purveyor of concrete products in the State of New Jersey (R 201a), doing an interstate business (Ex. P-6, R 383a), manufacture *round* concrete septic tanks, on Route 9, Waretown, Ocean County, New Jersey (Ex. P-3, R 379a, *et seq.*). As part of a functionally segregated enterprise, Warren has a manufacturing company, and a separate selling company (R 196a). A separate partnership, Vindico, owns

[2] This denial was not urged as grounds for reversal at appellate level. It is stated merely as background material.

and leases the plant, property and equipment to Warren. All these organizations, including the partnership, Vindico, are controlled by the same Warren officers, Messrs. Vincent Dotolo and Richard Dunkle (R 100a). In 1955 Warren respondents sold 3300 septic tanks. By 1959, its sales had risen to 6600 tanks (R 106a).

Warren's sole aim was to demonstrate its "superiority", by cornering the market, using the health inspection services as its vehicle, thereby preventing comparisons with the competition. In 1953, it succeeded in obtaining a monopoly in Roxbury (R 59b). The Board of Health of Roxbury passed a resolution on March 19, 1953 giving Warren an exclusive franchise, designating the "Keystone" (Warren) tank, by name, and adding "or one that equals or exceeds the same", as the only acceptable tank i Roxbury (Ex. P-14, R 371a, 390a). No standards were set as to what shall constitute "equal" or "exceed". Petitioner contends that this was special legislation in disguise, and made Warren and Roxbury partners in the conspiracy.

Thereafter, Warren's non-complying tanks[3] were found to be "more equal" than the complying tanks of petitioner or any other manufacturer. From 1953 to 1958, under this resolution, about 800 concrete septic tanks, practically all of the concrete tanks delivered in Roxbury Township, were installed by Warren (R 365a, *et seq.*, 371a).

Not to leave any tell-tale evidence of lack of compliance with the law, Mr. Higgins, the sanitary inspector, one of the respondents, kept no record of inspections (R 367a). He testified he kept the record of inspections "in his head" (R 368a) and made no measurements of the tanks (R 373a). No one ever supervised his work (R 372a). He had or-

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[3] See discussion, *infra*, on non-compliance of Warren tanks, p. 10, and Appendix "D" for details.

ders to accept only Warren's (round) tanks (R 174, *et seq.*). Another respondent, Rogers, testified that there were no such orders issued to Higgins (R 338a).

Warren advertised its product by false and fraudulent advertising (Ex. P-3, R 379a-381a), in violation of criminal laws (Title 18 U.S.C.A. Sec. 709) (R 233a). The F.H.A. and V.A. had to ask Warren to cease, desist and discontinue this practice (R 233a, *et seq.*). Warren also circulated a brochure to the trade entitled: "What Kind of a Sanitary Disposal System Should You Have?" (Ex. P-11, R 388a, 124a). In it appeared the statement, italicized a number of times: "See Your Health Inspector First". This reversed the requirement of N.J.S.A. 58:11-33 (Appendix "E"), which called for seeing him last, when the system was ready for inspection.

What was calculated to have been the danse macabre for petitioner, began in 1957. In that year, Warren instigated and Roxbury carried out, a massive campaign of vilification of petitioner's products, outlawing its tanks in Roxbury by means of arbitrary rejections (R. 161a, 162a, 171a, *et seq.*), and by resorting to threats of sanctions and secondary boycotts against petitioner's customers, if they used petitioner's products (R 172a). Thus, a total of about 26 known customers were lost to petitioner (R 149a, *et seq.*). Petitioner was not permitted to go into the reasons why these customers were lost (R 151a).

Warren went in for business feudalization. It repeatedly sought to make distributors or dealers of his manufacturer-competitors, and succeeded in doing so in two instances (R 170a, Ex. P-10, R 120a, 386a, 387a, 119a, R 71b, *et seq.*). When petitioner refused to heed the "persuasions" of Mr. Vincent Dotolo, threats of a price war were made and carried out against petitioner (R 157a, 170a), and promise of trouble with municipalities and its inspec-

tors, which would outlaw petitioner's tanks. According to Mr. Dotolo, the only way petitioner could market septic tanks was under the protection he could furnish if petitioner became his distributor (R 170a, *et seq.*).

To show petitioner he meant business, Mr. Dotolo, operating from Warren's plant, about 150 miles from petitioner's, began to assert his commercial "manhood". He laid siege to petitioner's market by ringing it with dealers, one of them on Route 206, only ¼th of a mile away from petitioner's plant (R 99a, 289a).

Warren went in for freight absorption, regardless of transportation differentials, and discriminatory pricing under a hocus-pocus sliding scale of prices, for the obvious purpose of destroying competition (R 222a, 145a, 146a, 279a, Exs. P-7, P-8, P-9, R 384a, *et seq.*, R 108a, 109a, 110a, 220a, 248a).

To gain this monopoly position, Warren also went in for corruption. Petitioner contends that the lubricant used was cash, derived from cash sales (R 63b, 121a, 122a), from fictitious unpaid accrued royalties (R 206a, *et seq.*) and from alleged selling expenses (R 227a, *et seq.*). Mr. Dotolo did not know whether these selling expenses aggregated $5 or $100,000 per annum (R 228a). Mr. Dotolo conceded Warren had a public relations program, "using its salesmen as contacting agents with municipal officials", to "acquaint them with Warren products" (R 113a).

Petitioner's president testified that in the year 1959 it had made over 20 cash sales, running into several thousand dollars (R 61a). Petitioner's expert, a N. J. certified public accountant[4], testifying from the books and records, stated

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[4] His statement determining losses arising from the conspiracy (Ex. P-43 for Ident., R 415a), showed total tank sales for that year was 285 (R 32b). That exhibit was not permitted to go into evidence (R 415a). See p. 27 *infra*, where non-admissibility is asserted as error.

that in that year petitioner had made no fewer than 29 cash sales (totalling $1,928.16) (R 362a). Warren admitted it had a special dispatcher as a regular employee, whose duty was to collect cash sales and to arrange "for cash and credit settlement". Nonetheless, Mr. Dotolo would have the court believe he had only one cash sale of one tank, amounting to $140.—, of a total of 6600 tanks sold in 1959 (R 122a, 383a).

Warren had apparently adulterated its product. Although it had tried, it had never succeeded in obtaining from the New Jersey State Department of Health, official recognition that its concrete septic tanks complied with Chap. 199, N. J. Laws of 1954 (N.J.S.A. 58:11-23, *et seq.*) (R 202a). Warren's tanks violated "Standards for the Construction of Sewerage Facilities, etc." (Ex. P-3, R 379a-381a), promulgated by the State Department of Health, pursuant to Chap. 199, Laws of 1954 (N.J.S.A. 58:11-23, *et seq.*). By short-sizing the tanks (as against the printed gallonage) (R 178a, 221a), in addition to violating the law as to capacity, Warren was also picking the consumer's pocket. Nonetheless, Roxbury accepted these tanks without question and without inspection (R 367a, R 12b). At the trial, petitioner was not permitted to introduce evidence from the lips of engineers to show these violations by Warren tanks (R 55a, 354a). The District Court, however, did permit the brochure of Warren to be put in evidence (Ex. P-3, R 379a, *et seq.*). The drawings, a part of this brochure, show *prima facie* that Warren's tanks do not comply with the requisite sections of "Standards" (Ex. P-16, R 401a). See Appendix "D" of this petition for details of these violations.

Tests made by a licensed civil engineer showed that petitioner's tanks met all tests, including a load test that in-

dicated its tanks could stand two to three times the load they might be expected to meet (R 352a-354a). The New Jersey State Department of Health found that they met the minimum requirements laid down in the New Jersey "Standards" (Ex. P-32, R 411a, 412a). Likewise, petitioner met F.H.A. requirements (Ex. P-13, R 389a). Nonetheless, on 4 separate occasions (R 127a-141a), Roxbury rejected petitioner's tanks (R 307a, 308a, 372a) to be replaced, apparently, by Warren tanks (R 137a, 374a). Thereafter petitioner no longer tried to sell tanks in Roxbury.

These rejections were obviously arbitrary and groundless, as revealed by the testimony of petitioner's president (R 127a-141a) and by an exchange of letters between respondent Mr. Higgins, the inspector, and Frankel & Frankel. In his answers, Mr. Higgins blossomed forth with a show of rhetoric rarely equalled. The reasons given by him for the rejections were only pretenses, designed to give petitioner a feeling of futility. Everything was done by him to create an image of Warren as the only acceptable tank manufacturer in Roxbury Township and to make operations of petitioner so unprofitable that it would abandon manufacturing and come in as Warren's distributor (Ex. P-15, R 391a, *et seq.*).

To establish arbitrariness, petitioner had two of these rejected tanks inspected by licensed professional engineers, who testified at the trial. They both pronounced them sound and in conformity with law (R 50a, 54a). The Board of Health of Roxbury Township, intoxicated with power, passed a resolution on May 13, 1958 (Ex. P-17, R 404a, 405a), thereby ratifying the acts of its inspector in rejecting the Byram tanks.

To buttress an obviously weak position and as part of the conspiracy,[5] Roxbury respondents passed a preclusive ordinance on December 18, 1958 (Ex. P-16, R 403a).

Feeling itself aggrieved by these conspiratorial acts of the respondents, petitioner instituted the within suit on December 12, 1959, in the United States District Court for the District of New Jersey (15 U.S.C.A. 7).

After suit and before trial in the federal court, there was a wholesale exodus by the Roxbury respondents, a number of them even leaving the community.[6] Also, the two owners of Warren respondents bailed out.[7]

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[5] Should *certiorari* be granted, petitioner is prepared to show that passage of the ordinance by Roxbury Township, as part of the conspiracy in restraint of trade, is an unconstitutional assumption of power; and Section III of such ordinance is an unconstitutional delegation of power (Ex. P-16, R 403a, R 111b). The requirements of N.J.S.A. 58:11-33, make inspections mandatory. Under this vague, obscure, indefinable, preclusive ordinance, Roxbury predetermined acceptability of a manufacturer's product in advance of delivery of their product, on the basis of drawings submitted. This is contrary to Chap. 199, Laws of 1954 (N.J.S.A. 58:11-23 *et seq.*) and, indeed, repeals it.

[6] The captain of the Roxbury team, the man who engineered the meeting that gave rise to the May 13, 1958 resolution, Mr. Leonard J. Farmer, President of the Roxbury Board of Health, deserted his teammates when he went to work in Wilmington, Delaware, and was not present at the trial (R 326a, T 4); Hulse Mooney quit as assessor and as member of the Board of Health of Roxbury (R 311a); Edison J. Read resigned (R 316a); John N. Klein and Frank Berry quit when their respective terms were up (R 326a, 330a); John H. Everly quit before his term was up (R 317a), and E. Blair Johnson quit after only 4 months on the Board (R 303a).

[7] Richard Dunkle sold out his 50% interest in 1961, and was not present at the trial (T 3). Mr. Vincent Dotolo then sold 60% of his 50% interest in the Warren companies, leaving him with a 20% interest in the companies (R 201a).

Trial was moved before the HON. JAMES A. COOLAHAN, Judge, and a jury, on November 27, 1962 and continued thereafter for 8 days. After petitioner rested, Judge COOLAHAN dismissed the jury with these words (T 1233):

> The Court: "All right, we will continue until Monday morning. You will be excused until Tuesday and if your attendance is required the clerk will notify you by telephone on Monday.
>
> "Monday we have other matters on and this case will not be tried other than motions, which are legal motions, which you couldn't be in to hear anyway. So you will receive your notification on Monday from the jury clerk with respect to your services on Tuesday, if necessary.
>
> "Now, is that understood?
>
> "Juror No. 10, you go to Florida and have a good time."

On the morning of December 11, 1962, motions for dismissal of both causes of action were made by the two sets of respondents. These motions for directed verdict were granted by the court. Letter opinion, dated December 14, 1962, by the HON. JAMES A. COOLAHAN, followed (Appendix "A"). Judgment of dismissal "with costs" was entered on December 28, 1962.

Notice of Appeal was filed on January 9, 1963 in the Court of Appeals for the Third Circuit. The appeal was heard on September 23, 1963. Judgment was entered by the Court of Appeals on October 23, 1963 "with costs". Petition for rehearing was denied, without opinion, on November 27, 1963. Motion for a stay of the mandate was made on December 24, 1963. On the 10th day of January, 1964, that motion was granted. It extended the time for entering the mandate, to February 25, 1964.

## F. Reasons for Granting the Writ

**I. The decisions below conflict with the purposes of Congress, with this Court's decisions, with those decisions in other circuits, and even with those within the circuit, which impose liability on those who conspire to monopolize, and provide for recovery of damages by those who suffer from the natural consequences of the wrongful acts.**

This unique case presents a question of great public importance involving a conspiracy between a commercial enterprise and municipal officials, that gave monopoly position within township borders of Roxbury to the former, and untaxed income to the latter.

The closing of the Roxbury market to the petitioner was a denial of the equal protection of the laws, in abrogation of the XIVth amendment to the United States Constitution, and a denial of the democracy of the market, which the Sherman Act guarantees.

Unless enjoined, the practices herein enumerated, not only constitute a threat to individual liberty and free enterprise, but open wide the doors to municipal corruption and its concomitant evasion of the Internal Revenue Laws.

1. The District Court had jurisdiction as to the first cause of action, seeking to enjoin the aggressive potentialities of the respondents, and damages for wrongs already done. As seen above, that court rested its decision on the two page letter of December 14, 1962 (Appendix "A"), citing *Parker* v. *Brown*, 317 U. S. 341 (1943). Parker involved state legislation, which had the same application to everybody in the raisin-growing industry throughout the state (California), and did not discriminate against any grower. The enabling act in New Jersey, Chap. 199, Laws

of 1954 (N.J.S.A. 58:11-23 *et seq.*), did not authorize Roxbury to go in for preclusive acts. Parker is, therefore, inapposite. In affirming the action of the District Court, the Court of Appeals nullified the salutory purposes of the Sherman Act and the cases decided by this Court, *viz.*: *Georgia* v. *Evans*, 316 U. S. 159 (1942); *Chattanooga Foundry* v. *Atlanta*, 203 U. S. 390 (1906); *United States* v. *Southern Pacific Co.*, 259 U. S. 214, 239, 240 (1922); *Pennoyer* v. *McConnaghy*, 140 U. S. 363, 366 (1891); *Bankers Life and Casualty Co.* v. *Holland*, 346 U. S. 379, 384 (1953); *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593, 598 (1951); *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 226 (1947); *Sentilles* v. *Inter-Caribbean Shipping Corp.*, 361 U. S. 107, 110 (1959). What we distill from these cases is that jurisdiction was here present, and that neither the Board of Health of Roxbury, the members thereof, nor its inspector, enjoy any special exemption or special immunity under the Sherman Act, civilly or criminally.

2. The District Court had jurisdiction of the second cause of action, seeking to set aside a resolution dated March 19, 1953, passed by the Roxbury Board of Health, and a determination of the constitutionality of the ordinance of December 18, 1958, passed by the Township of Roxbury, which petitioner contends repealed Chap. 199, N. J. Laws of 1954 (N.J.S.A. 58:11-23 *et seq.*), was tailored to continue the conspiracy. *California Reduction Co.* v. *Sanitary Reduction Works*, 199 U. S. 306 (1905) (in which an ordinance granting a monopoly in garbage collection was considered); *Meredith* v. *Winterhaven*, 320 U. S. 228, 234, 237 (1943) (wherein a question of state law was decided); *United Enterprises, Inc.* v. *Dubey* (5th C. C. A., 1942), 128 F(2) 843, 844 (where state statute was considered, even where there was no prior determination by state court); *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886)

(where delegation of naked arbitrary power was considered).

3. Whether interstate commerce is affected, depends not necessarily upon petitioner's commerce, but as well on commerce of respondents, Warren. The latter's sales, admittedly made both in New York and New Jersey, brings this case within the Sherman Act. Once interstate commerce is established, the Sherman Act may be applied to "local" restraints on commerce, without proving public injury. *Klors* v. *Broadway-Hale Stores*, 359 U. S. 207, 213 (1959); *Moore* v. *Mead's Fine Bread Co.*, 348 U. S. 115, 118, 119 (1955); *United States* v. *Women's Sportswear M'frs Ass'n*, 336 U. S. 460, 464 (1949); *United States* v. *Employing Plasterers Ass'n*, 347 U. S. 186, 189 (1954). This would seem to dispose of *Radiant Burners* v. *People's Gas Co.*, 364 U. S. 656, 660 (1961), cited by the trial court, which actually supports the petitioner's position.

4. On the subject of damages, precise proof was unnecessary. The question is what profit petitioner would have enjoyed under free competitive conditions. *Bigelow* v. *R.K.O. Radio Pictures*, 327 U. S. 251, 264 (1946). Petitioner need only show unreasonable restraint of trade and that it suffered injury. Damages may be uncertain in amount. *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 561 (1931). They may be partly estimates and partly factual and as definite and certain as the subject matter admits. *Eastman Kodak Co.* v. *Southern Photo Material Co.*, 273 U. S. 359, 379 (1927); *Connecticut Importing Co.* v. *Frankfort Distillers* (C. C. A. 2d, 1939), 101 F(2) 79, 81; *William H. Rankin Co.* v. *Associated Bill Posters of U. S.* (C. C. A. 2d, 1930), 42 F(2) 152, 155; *Frey & Son* v. *Welch Grape Juice Co.* (C. C. A. 4th, 1917), 240 F. 114, 117; *William Goldman Theatres* v. *Loew's*, 69 F. Supp. 103, aff'd (C. C. A. 3d, 1947), 164 F(2) 1021, cert. den. 92 L. Ed. 1742.

**II. Petitioner, against whom a directed verdict was ordered by the trial Court, affirmed by the Court of Appeals, was deprived of a jury trial, in contravention of the Seventh Amendment to the United States Constitution and Rule 38 of Federal Rules of Civil Procedure.**

We confess our inability to harmonize the convincing evidence marshalled by the petitioner at the trial with the directed verdict of the trial court and the affirmance by the Court of Appeals.

The right to trial by jury is firmly embedded in American jurisprudence. This Court does not look with favor on any erosion, whittling away, or denial of that right. See *e.g., Gollowy* v. *United States* (minority opinion), 319 U. S. 372, 407 (1943); *Beacon Theatres, Inc.* v. *Westover*, 359 U. S. 500, 504 (1959); *Continental Ore Co.* v. *Union Carbide Corp.*, 370 U. S. 690, 696 (1962), cases where this Court has reaffirmed the importance of the Seventh Amendment. Joint Statement of Mr. Justice BLACK and Mr. Justice DOUGLAS on the Rules of Civil Procedure, and the proposed amendment of Rule 50(a), did not "approve of this sapping of the Seventh Amendment's guarantee" by means of a "technical coup de grace" (9 L. Ed. 2d, lxvi).

While no standard or formula can be framed as to the *quantum* of proof, to guide the trial judge in the direction of a verdict or in the denial of it, the Second Circuit made the following suggestion to trial judges in *Fratta* v. *Grace Line, Inc.* (C. C. A. 2d, 1943), 139 F(2) 743:

> "We take the occasion to suggest to trial judges that, generally speaking—although there may be exceptions—it is desirable not to direct a verdict at the close of the evidence, but to reserve decision on any motion therefor and to allow the jury to bring in a ver-

> dict; the trial judge may then, if he thinks it improper, set aside the verdict as against the weight of the evidence and grant the motion, Rule 50(b), with the consequence that if, on appeal, we disagree with him, we will be in a position to reinstate the verdict, thus avoiding the waste and expense of another trial."

The more so does this suggestion carry weight where, as here, the suit is one in anti-trust, involving a protracted trial and a lengthy and expensive record.

The threats carried out by Mr. Dotolo (R 170a), coupled with the later arbitrary rejections in Roxbury (R 273a) of petitioner's complying rectangular tanks, and the exclusive admission of non-complying round tanks of respondent Warren (Ex. P-3, R 379a, 190a, 191a), without more, show *prima facie* that respondents had a common design, purpose and understanding that spell out a conspiracy. This evidence and the inferences to be drawn therefrom, were sufficient to submit the issue to the jury. *Wilkerson* v. *McCarthy*, 336 U. S. 53, 57, 62 (1949); *Webb* v. *Illinois Central R. Co.*, 352 U. S. 512, 514 (1957).

A threat of reprisals made to a competitor is a completed overt act, illegal in itself under the anti-trust laws, *Albert Pick-Barth Co.* v. *Mitchell Woodbury Corp.* (C. C. A. 1st, 1932), 57 F(2) 96, 101. Suppressing competition by unfair methods, is likewise a violation. *Ibid.* p. 102.

It is not the function of the court to search the record for conflicting circumstantial evidence to take the case away from the jury, *Sentilles* v. *Inter-Caribbean Shipping Corp.*, 361 U. S. 107, 110 (1959).

It is not for the judges to resolve debatable issues of fact on which fair-minded men might differ, *Stone* v. *New York C. & St. L. R. Co.*, 344 U. S. 407, 409 (1953). For the judges to do so, violates the command of the Seventh

Amendment to the Federal Constitution, *Atlantic Gulf Stevedores, Inc.* v. *Ellesman Lines, Ltd.*, 369 U. S. 355, 359 (1962); *Byrd* v. *Blue Ridge Rural Electric Co-op, Inc.*, 356 U. S. 525, 537 (1958). Conflicting inferences and conclusions raise a question for the jury, *Dovie Ray Baker* v. *Texas & Pacific R. Co.*, 359 U. S. 227, 229 (1959). Fact finding by the jury does not require mathematical certainty, *Schulz* v. *Pennsylvania R. Co.*, 350 U. S. 523, 526 (1956). Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs, grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can be fairly drawn, *Schulz* v. *Pennsylvania R. Co., supra*, p. 526. Even if each of the several acts alleged to have been done in furtherance of the alleged conspiracy might not alone constitute any federal offense (here denied), it is of no consequence, if taken together, the intent and purpose was to restrain interstate commerce. The plan may make the parts unlawful, *Swift & Co.* v. *U. S.*, 196 U. S. 375, 395, 396 (1905); *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 312 (1923). The object and intent of the combination determines its legality, *Loewe* v. *Lawlor*, 208 U. S. 274, 297 (1908). This would seem to dispose of *Schad* v. *Twentieth Century Fox Film Corp.* (C. C. A. 3d, 1943), 136 F(2) 991, cited by the trial court in its December 14, 1962 letter (Appendix "A").

**III. The Court of Appeals has sanctioned or so far departed from the accepted and usual course of judicial proceedings, as to make such action tantamount to a denial of due process, in contravention of the Fifth Amendment to the United States Constitution.**

That it was necessary for the Court of Appeals in its *per curiam* judgment, to make a conclusion of an ultimate fact, not found by the District Court, and at variance with

an action pursued at the state court level, is proof *per se* that the sweeping unexplained affirmance had to be buttressed by something. With all deference, the Court of Appeals erroneously assumed as a fact that an earlier state court action brought by petitioner against Roxbury respondents only, for vilification of its products, which was summarily dismissed without trial, constituted collateral estoppel or *res judicata* in the federal suit charging conspiracy in restraint of trade. That, the Court of Appeals could not do as a matter of law, considering the evidence.

That the cause of action in the federal court is factually vastly different from the one in the state court, is best delineated by an examination of the Statement of Facts in each of the briefs in the Court of Appeals: *viz.*, Warren defendants (Wb 7); Roxbury defendants (Rb 10, 26); and petitioner (Pb 17). See also an excerpt from affidavit in opposition to motion to strike complaint (R 18a).

As the Relevant Docket Entries of the District Court reveal, a motion was made by Warren defendants for summary judgment, on the ground that the matter was *res judicata* (see R 421a, annexed to this petition) (Appendix "G"). After argument, the motion was withdrawn (see Relevant Docket Entries, R 1a, 2a). It is significant that the Roxbury defendants, most involved in this question, did not move against the complaint on any like ground. By their silence on this score, the Roxbury defendants conceded that no grounds for the claim of *res judicata* existed.

Neither the petitioner in its appendix, nor Roxbury or Warren defendants, in their joint appendix (R 1b, *et seq.*) included any of the motion papers or affidavits in support of or in opposition to the claim of *res judicata*, because it was recognized by all parties that this claim was without any basis.

The State of New Jersey has no anti-trust statute, nor was the complaint in the state court grounded in anti-trust. Therefore, the state court had not the power to and could not render a decision on anti-trust matters. Neither collateral estoppel nor *res judicata* could apply here. *cf. United States* v. *Radio Corp. of America*, 358 U. S. 334, 352 (1959).

The issue in the state court was whether there had been illegal interference with petitioner's business by a municipal Board of Health, its members and inspector. Warren was not a party to that suit. In the federal court, the issue is whether Sections 1 and 2 of the Sherman Anti-Trust Act have been violated by a monopolist in conspiracy with municipal officials. These issues are incompatible and unequatable. The anti-trust law has a broader application than the prohibition of restraints of trade unlawful at common law. *Loewe* v. *Lawlor*, 208 U. S. 274, 297 (1908).

The normal rule is that a prior judgment need be given no conclusive effect at all, unless it establishes one of the ultimate facts in issue in the subsequent proceeding. *Yates* v. *U. S.*, 354 U. S. 298, 338 (1957).

Even assuming, however, that the prior state action was one in anti-trust, here stoutly denied, it could not bar the instant suit for subsequent anti-trust acts, by the same defendants, and by other defendants joined as conspirators in this suit, where there were allegations of new or continuing anti-trust violations. *Lawler* v. *National Screen Service Corp.*, 349 U. S. 322, 329 (1955). The raising of this issue by an appellate court, without petitioner being afforded an opportunity to meet it by brief and oral argument, constituted a denial of due process.

## IV. Two Courts below have narrowly decided an important question of discovery under Federal Rule 34, which has not been but should be settled by the United States Supreme Court.

The District Court and the Court of Appeals refused to look at the "facts" of economic life and the means employed that condition current economic traffic.

Corruption in the inspection services, as here alleged is one of those means. Involving as it does the building materials, and ultimately the housing industry, the corruption lays a heavy tribute on resources of home owners, lowers living standards and is fraught with great peril to the sacred trust committed to our public officials.

Petitioner had pleaded in its First Cause of Action, that the relationship between Warren and Roxbury had been infected by a corrupt bargain (R 14a). As seen above, respondent Warren had stated, in answer to interrogatories, that in 1959 it had but one cash sale (R 122a).[8] Seeking to show that cash was used by Warren to corrupt Roxbury, petitioner moved before Judge MEANEY to inspect original delivery tickets, which would show which were sales for cash and which sales for credit.[9] This motion was first granted. Later, after Warren asked to be relieved from its operation, the motion was denied (R 18a) (Transcript of motion November 28, 1960, filed December 16, 1960) (R 24a) (Transcript of motion January 23, 1961, not filed).

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[8] That this was incredible is attested by the fact that petitioner, having a sales volume of about 4½% of Warren's had made over 20 cash sales, totalling $1,928.16, in that year (Ex. P-43, for ident., R 61a; 362a, R 32b).

[9] They would also show whether Warren, when specified by the municipality, was in a position to demand cash. See Appendix "F", item 12.

In denying the motion, however, Judge MEANEY had stated that these delivery tickets could be subpoenaed for the trial, to test out the truthfulness of any answers made by respondents Warren (R 22a). As seen above, petitioner did subpoena them for the trial. The trial court (Judge COOLAHAN sitting) summarily quashed the subpoena calling for these delivery tickets (R 66a).

A party to an anti-trust suit cannot insulate itself against discovery and disclosure of the facts that would tie him into the conspiracy, *Quemos Theatre Co., Inc.* v. *Warner Bros. Pictures, Inc.*, 35 F. Supp. 949, 950 (D. C. N. J., 1940). The question in these cases is always whether the annoyance or damage from disclosure in discovery will outweigh the injury to a party and to the public from the disallowance of such discovery. Even if complete discovery were not deemed advisable or essential in the instant case, partial discovery by the method of sampling a representative month's delivery tickets, should have been permitted to determine what cash sales were made. *Empire Rayon* v. *American Viscose Corp.*, 2 F. R. Serv. 2nd 34.42 case 4; *Shawmut, Inc.* v. *American Viscose Corp.*, 15 F. R. Serv. 30b.352 case 1, 11 F. R. D. 562; *Schenley Industries* v. *Industries Products Co.*, 19 F. R. Serv. 30b.35 case 1, 16 F. R. D. 13.

Warren's objections to the inspection of delivery tickets, were that they were trade secrets (R 10b). However, there is nothing sanctimonious about a competitor's records and prices, in anti-trust suits. *Byers Theatres, Inc.* v. *Murphy* (U. S. Dist. Ct. W. D. Va., May 20, 1941), 3 F. R. S. 34.41, case 5; Dept. Just. Bull., No. 79; 1 F. R. D. 286. In that action the court stated (p. 288):

> "Nor do I think the prices, as shown by the contracts, partake of the nature of trade secrets or are confidential to such an extent as to give them any particular sanctity, and such prices may be quite relevant."

From the Roxbury respondents, plaintiff sought answers to interrogatories which would show unreported property or income, in order to create an inference that bribe money had passed. All such interrogatories dealing with their personal financial affairs, which would show unaccounted income or property, were stricken *in toto* by Judge MEANEY (R 28a). Representative samples of the questions asked are found in R 25a-28a. In brief they sought:

a) An analysis of the respondents' bank deposits;

b) Proof of expenditures;

c) Proof of increase in net worth.

These same methods are now being used by the Federal Government to track down tax evaders and racketeers. In *Jelaza* v. *United States* (4th C. A., 1950), 179 F(2) 202, the government employed the expenditure, bank deposit and net worth increase evidence, to show corrected net income. In *Holland* v. *United States*, 348 U. S. 121, 129 (1955), the net worth approach was used by the government.

Thus, petitioner was frustrated in its quest to find out who got what, when and where. The two courts below took a timorous judicial approach to the subject of discovery that would show corruption of municipal officials[10]

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[10] *cf.* That there is an undoubted obligation on the part of public officers to disclose their financial affairs, is best summed up in the following quote from "The Public Papers and Addresses of Franklin D. Roosevelt", Vol. I, p. 583, Random House, New York (1938). a Memorandum on the Removal of Sheriff Thomas A. Farley of the County of N. Y., February 24, 1932 (who refused to answer questions concerning his personal finances):

"The stewardship of public officers is a serious and sacred trust.

*(Continued on following page)*

as being monopolistic, affecting as it does price and quality of the product, and the impoverishment of the competition.

**V. The Court of Appeals, by approving the rulings of the trial Court as to exclusion of evidence, has so far sanctioned such a departure of judicial proceedings by a lower Court, as to call for an exercise of this Court's power of Supervision.**

Both in the denial of pretrial discovery (R 25a-28a) and in the admission and exclusion of evidence, the trial court revealed a fixed determination to exclude all evidence that would directly link Warren and Roxbury in a conspiracy, the absence of which would furnish the grounds for a directed verdict of dismissal. See *infra* and "Other Items of Exclusion of Evidence, Appendix "F": Although petitioner charged in its complaint that Warren respondents had been guilty of illegal conduct in Roxbury and elsewhere (R 12a), and had sought an injunction against it in Roxbury and elsewhere (R 15a), Roxbury alone, of all the municipalities where Warren operated, was made a party. The trial court accordingly restricted all evidence just to Roxbury (R 44a, 55, 332a, 401a, 418a).

The rulings objected to raise important questions concerning the admissibility of evidence in an anti-trust suit. The broad discretion and great latitude permitted by Rule

*(Continued from preceding page)*

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They are so close to the means for private gain that in a sense not at all true of private citizens, their personal possessions are invested with a public importance in the event their stewardship is questioned. One of their deep obligations is to recognize this, not reluctantly, or with resistance, but freely. *It is in the true spirit of public trust to give, when personally called upon, proof of the nature, source and extent of their financial affairs.*" (Emphasis ours.)

43(a) of the Federal Rules of Civil Procedure, in the matter of reception of evidence, was not followed by the trial court. Neither was *United States* v. *General Electric Co.*, (D. C. N. J., 1949), 82 F. Supp. 753, 903[11] (an anti-trust case).

Petitioner, however, does not have to prove an unlawful agreement. It may be inferred from other evidence, which taken together creates more than just a coincidence. *National Appliance Corporation* v. *Manitowoc Company*, 311 F(2) 896, 900 (C. C. A. 7, 1963). Where parties have veiled their conspiracy, as here, and have said that they do not know each other (R 100b, 68b), this Court may consider it an incredible and an amazing coincidence and hold a conspiracy was proved, as was done in *Ball* v. *Paramount Pictures*, 169 F(2) 317, 319 (C. C. A. 3rd 1948).[12]

The trial court looked upon the actors here as never having stepped on the same stage, and as never having acted in the same play. A curtain of verbiage was erected by the respondents to separate them. A conspiracy, however, is a partnership, and each conspirator is the agent of the other. *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229, 249 (1917); *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 254 (1940); *Feswick* v. *United States*, 329 U. S. 211, 217 (1946); *United States* v. *Gooding* (U. S.), 12

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[11] Judge FORMAN, who sat in that case, indicated the latitude and longitude of Rule 43(a). He is now a Judge of the 3rd Circ. Court of Appeals, but was not among the judges who considered either the appeal or the petition for rehearing in this case.

[12] Judge MCLAUGHLIN, writing for that court (p. 319), quoted from "Temporary National Economic Committee, Mimeograph" No. 16, p. 15:

> "The picture of conspiracy as a meeting by twilight of a trio of sinister persons with pointed hats close together belongs to a darker age."

Wheat. 460, 475, 6 L. Ed. 693 (1827); *Lutwak* v. *United States*, 344 U. S. 604, 617 (1953); and where proof aliunde existed that Warren defendants were connected with the conspiracy, declarations by one are admissible against the others. *Schine Chain Theatres, Inc.* v. *U. S.*, 334 U. S. 110, 116 (1948); *Glasser* v. *U. S.*, 315 U. S. 60, 74, 80 (1942).

As seen above, questions dealing with arbitrary and capricious rejections of petitioner's acceptable products and illegal acceptance of Warren's non-complying products, were held inadmissible under the restrictive trial court policy (R 44a, 48a, 55a, 56a). That this arbitrary and capricious practice is monopolistic is too clear to require the citation of authorities on admissibility.

So, too, where the salesman's instructions were to sell to anybody within the area, evidence which would show that Warren used its salesmen in seeking to make a distributor out of petitioner (R 289a, 141a-145a, 197a), was admissible. 2 *Am. Jur., Agency*, 2d, sec. 69, *et seq.*; 2 Mechem, Agency (2d), sec. 1785. Questions showing relative size, that would indicate relative economic power, *United States* v. *Aluminum Co. of America*, 148 F(2) 416, 445 (C. C. A. 2d, 1945) were likewise admissible (R 41a). These were all excluded.

On the subject of petitioner's damages, the District Court refused:

a) To admit Ex. P-43, for identification (R 414a), which would show by petitioner's expert accountant, that $58,000 was lost by petitioner over the period January 1, 1956 to December 12, 1959. This was an abuse of discretion. It should have been admitted, if not as proof of the claim itself, as a statement of petitioner's claim, under proper instructions to the jury. *American Vitrified Products Co.* v. *Wyer* (C. C. A. Mich., 1955), 221 F(2) 447, 453, 454.

b) To admit evidence of petitioner, by its records, of customers lost over the period of the suit and since the rejections in Roxbury, and the reasons therefor given by petitioner's customers (R 146a-154a, 162a-168a). Motive may be shown as an exception to hearsay evidence rule. 6 *Wigmore, Evidence* (3d Ed. 1940), sec. 1729(2); *Herman Schwabe, Inc.* v. *United Machinery Corp.*, 297 F(2) 906, 914 (C. C. A. 2, 1962).

c) To admit evidence of plaintiff's efficiency, that would permit an inference that losses and damages incurred by plaintiff, testified to by its accountant, were only such as arose from defendants' conspiratorial activities, and to exclude inefficiency as a factor contributing to plaintiff's losses (R 39a). *William H. Rankin Co.* v. *American Bell Porters of U. S.*, 42 F(2) 152, 155 (C. C. A. 2, 1930); *Atlas Building Products Co.* v. *Diamond Block and Gravel Co.*, 269 F(2) 950, 958, 959 (C. C. A. 10, 1959); *Elyria-Lorraine Broadcasting Co.* v. *Lorain Journal Co.*, 298 F(2) 356, 358 (C. C. A. 6, 1961).

For other items of exclusion of evidence, see Appendix "F". It is contended that these exclusions by the District Court, constituted an abuse of discretion.

The District Court quashed *subpoena duces tecum* served on Mr. Vincent Dotolo, asking him to bring with him: delivery tickets for inspection, that would show whether only one cash sale was made by Warren, as stated by Warren in answers to interrogatories (R 66a, 67a, 75a-82a); minute book of Warren companies, that would show relationship among the corporate defendants and the partnership Vindiço, and whether witness was testifying in his own behalf, because of interest in enterprises, or on behalf of others (R 67a); contracts, leases and documents which would show the relationship between Warren corporate defendants and Warren Concrete Products Co. of Warren,

Pa., and the royalties due the latter from the use of spinning machine (R 86a, 206a); documents regarding reorganization of Warren corporate defendants into a new company, Warren Industries, Inc., in order to determine what was the interest of witness in successor enterprise (R 93a); cost data that would show transportation costs per tank, as having a bearing on amount of freight absorption and pricing practices when shipping tanks into geographic area served by plaintiff (R 95a-97a). This was plain error. *Gordon, Wolf Cowan Co.* v. *Independent Halvah,* 9 F. R. D. 700, 702; *Federal Trade Comm.* v. *National Lead Co.,* 352 U. S. 419, 427 (1957); *H. R. Reports,* 2287, 74th Cong., 2d Sess., p. 3 (1936).

Having been thus severely restricted in its proof by the trial Court, when petitioner then rested its case, the respondents both moved for a directed verdict of dismissal. In granting the motion and dismissing the case, the trial judge delivered this peroration ( 103b):

> "It is my opinion that this case is a glaring example of vicious, harassing and vexatious litigation. The whole history of the case brings that out. It is a case based upon charges of bribery, conspiracy and monopoly, and the facts of this case are completely void of any proof. There is no basis for this case under the Act * * *."

## CONCLUSION

It is, therefore, respectfully submitted that this Court has jurisdiction to review this petition on writ of *certiorari;* under Rule 19(1)(b), of the Rules of the Supreme Court of the United States, and that for the foregoing reasons this Court should:

1) Grant *certiorari;*

2) Reverse the judgment below;

3) Remand the case for a new trial;

4) Issue an *ad interim* injunctive order against the respondents[13] which will preserve the *status quo* and protect the petitioner's right to do business in the Township of Roxbury, pending final decision by this Court and retrial by the trial court; and

5) Stay judgment for costs in the Court of Appeals until final determination by this Court and by trial court on remand.

Respectfully submitted,

FRANKEL & FRANKEL,
*Attorneys for Petitioner.*

LEOPOLD FRANKEL,
*Of Counsel.*

---

[13]This was prayed for in the complaint (R 15a) and denied at the trial level, by dismissal and directed verdict. On appeal the trial court's action was affirmed in all respects, *supra*.

# APPENDIX "A"

## Letter Opinion of Judge Coolahan

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
NEWARK 1, N. J.

*In re Byram Concretanks, Inc.* v. *Warren Concrete Products Co. of N. J., et al*—Civil Action No. 1147-59

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Dear Sirs:

At the conclusion of the arguments on the motion to dismiss the above action I stated that it was the Court's opinion that the Sherman Act did not apply against a State or a Municipality or branch of a Municipality, such as a Board of Health. You will recall that I stated I was unable to find any cases on the point but I now refer you to *Parker* v. *Brown*, 317 U. S. at p. 341 (1943).

In that case Mr. Chief Justice Stone fully analyzed the responsibilities of a State with respect to the Sherman Act

and on page 350 he stated, "We find nothing in the language of the Sherman Act or in its history suggesting that its purpose was to restrain a State or its officers or agents from activities directed by its Legislature."

It appears to me that if a State could not be held liable for any of its actions under the Sherman Act that it must necessarily follow neither can a Municipality or an arm of a Municipality, such as a Board of Health, or can its agents be liable for any of its Legislative acts. This point, of course, you will recall, was not raised by any of the parties to this action but was raised by the Court.

While the above point is of significance, the prime motive for dismissing this action is the fact that the evidence was insufficient to show a combination or conspiracy in restraint of trade or a restraint or monopolization of trade or commerce under the Sherman & Clayton Acts. See *Schad* v. *Twentieth Century Fox Film Corp.*, 136 F. 2d p. 991 (3rd Cir. 1943). In fact, there has been no proof of any conspiracy whatsoever.

The test to be applied by the Court in considering a motion for a directed verdict, simply stated, is that the Judge must consider all evidence favorable to the plaintiff as the truth and if there is a tryable issue of fact on just this evidence alone, then the case must go to the jury. This most favorable evidence test can result in a verdict against the plaintiff when he has not proven all the facts of the case comprising his burden of proof. In short, it is not the quantity of the evidence but the presenting of at least some evidence on all aspects of the case necessary to prove plaintiff's claim. In this particular type of litigation the plaintiff is required by statute and case law to prove certain basic principles and absence of proof on any of these issues

must result in the dismissal of a plaintiff's case, as a matter of law.

It is basic to all civil anti-trust actions that the plaintiff allege and prove violation of the anti-trust statutes and that the plaintiff was damaged thereby. The acts of which the plaintiff complains must interfere with the natural flow of Interstate Commerce as well. As was pointed out in the case of *Klor's* v. *Broadway Hale Stores*, 359 U. S. 207 (1959) at page 213, in referring to the defendant's actions in that case; "It interferes with the natural flow of Interstate Commerce. It clearly has, by its 'nature' and 'character', a 'monopolistic tendency'."

This concept was again reiterated in the per curiam opinion in *Radiant Burners* v. *Peoples Gas Co.*, 364 U. S. 656 (1961).

Plaintiff has alleged in the action at Bar that it had been deprived of selling its tanks in Roxbury Township by the conspiracy of the defendants. However, there was a complete failure of proof on this allegation and likewise plaintiff has not sustained his burden of proving that there was any interference with Interstate Commerce at all. The above cited Supreme Court decisions may have given protection to the individual for any violations of the Act, exclusive of their magnitude, but it did in no way change the basic requirements which the plaintiff must prove.

As previously stated, I reiterate that the plaintiff in this case has failed entirely in proving any of the elements which would constitute a violation of the Act and that he was damaged thereby.

Submit appropriate order.

Very truly yours,

JAMES A. COOLAHAN

# APPENDIX "B"

## *Per Curiam* Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,368

BYRAM CONCRETANKS, INC.,

*Appellant*

*v.*

WARREN CONCRETE PRODUCTS CO. OF N. J., WARREN CONCRETE TANK CO., INC., VINCENT DOTOLO, RICHARD DUNKLE, PATRICK E. HIGGINS, LEONARD J. FARMER, JOSEPH W. ROGERS, HULSE MOONEY, EDISON READ, JOHN W. KLEIN, FRANK M. BERRY, EDWARD C. STIERLI, JOHN EVERLY, E. BLAIR JOHNSON, and BOARD OF HEALTH OF ROXBURY TOWNSHIP

Appeal from the United States District Court
For the District of New Jersey

Argued September 23, 1963

Before MARIS, KALODNER and GANEY, *Circuit Judges.*

## *Appendix B*

OPINION OF THE COURT

(Filed—October 23, 1963)

PER CURIAM:

This is a suit by the plaintiff, a manufacturer of precast concrete septic tanks, against the defendant corporations, who were competitors in that business, the Board of Health of Roxbury Township, Morris County, New Jersey, the Health Officer of that township and the individuals who were members of the Board of Health at various times. The complaint alleged violation of the anti-trust laws and sought treble damages and an injunction. Its institution followed the dismissal with prejudice of a suit arising out of the same controversy which the plaintiff had brought against some of the individual defendants in the Superior Court of New Jersey. After lengthy interlocutory proceedings (see e.g. Byram Concretanks, Inc. v. Meaney, 3 Cir. 1961, 286 F. 2d 170) the case came on for trial in the district court. At the conclusion of the plaintiff's evidence the court dismissed the complaint upon motion of the defendants. The plaintiff thereupon took the appeal now before us.

Our study of the record satisfies us that the district court did not err in its conclusion that the plaintiff had failed to prove its case. We have also considered the plaintiff's contentions that there were trial errors but find them so lacking in merit as to require no discussion.

The judgment of the district court will be affirmed.

A true Copy:

Teste:

*Clerk of the United States Court of Appeals for the Third Circuit.*

# APPENDIX "C"

## Opinion of Court of Appeals—*Byram* v. *Meaney*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,483

BYRAM CONCRETANKS, INC.,
*Petitioner*

*v.*

HONORABLE THOMAS F. MEANEY,
*Respondent*

Petition for Writ of Mandamus

Submitted December 27, 1960

Before GOODRICH, MCLAUGHLIN and FORMAN,
*Circuit Judges.*

OPINION OF THE COURT

(Filed—January 19, 1961)

PER CURIAM

This is an action for mandamus brought against one of the district judges for the District of New Jersey. The

allegation complains that the district judge unduly restricted the applicant in his interrogatories in a pending litigation and that he acted contrary to what one of his fellow judges had ordered on the same point. We think that this is not a proper case for mandamus, *TCF Film Corp.* v. *Gourley*, 240 F. 2d 711 (3d Cir. 1957). This Court has said many times that mandamus is not to be taken as a substitute for appeal. *E.g., Green* v. *Murphy*, 259 F. 2d 591 (3d Cir. 1958). The district judge was acting in a case which was before him and the action he took was within his authority. If he was wrong the error can be corrected on appeal. The petition will be denied.

A true Copy:

Teste:

*Clerk of the United States Court of Appeals for the Third Circuit.*

# APPENDIX "D"

## Items of Non-Compliance of Warren Tanks

Sec. 5.1 of "Standards" called for liquid capacity tanks of a given size for homes having a given number of bedrooms. Septic tanks delivered by Warren on two occasions where plaintiff had spot-checked them, showed they were short-sized (P-10, 386a, 178a, 221a). This was in clear violation of the section and a fraud on the consumer.

Warren's tanks did not comply with Chap. 199, Laws of 1954, as revealed by "Standards" promulgated by the Commissioner of the New Jersey State Department of Health, in the following respects:

| *Section of Standards* | *Requirements of 'Standards" (indicated by quotations), followed by Violation by Warren Tanks of these Standards (P-3, 379a)* |
|---|---|
| 5.6 | "Materials—Septic tanks may be constructed of the following: |
| | • • • |
| | "(b) Precast reinforced concrete."<br>A high State official, a Professional Engineer himself, and 3 other professional engineers, pronounced at the trial, that "reinforced concrete" means "reinforced all over" (53a, 57a, 272a, 357a). |
| | Warren had reinforcing only at the top and bottom of its tanks (P-3, 379a), none in the walls, except for one model, IND-1000 (191a), which is not spun. |

## *Appendix D*

*Requirements of "Standards" (indicated by Section of Standards) quotations), followed by Violation by Warren Tanks of these Standards (P-3, 379a-381a)*

5.10 "* * * the top of all tees or baffles shall be extended to comply with Section 5.12 and in no case shall be less than 8" above the invert of the outlet".

Warren's baffles extended but 7" above the invert of the outlet [See Models 800, 1000 part. and 1000 (P-3, 379a-381a)]

5.11 "Multiple outlets—Where the inside width of the septic tank exceeds 5', multiple outlets constructed in the same manner as provided in Section 5.10 shall be installed as follows:

| *Inside Width of Tank* | *Number of Outlets* |
|---|---|
| 5 to 7 feet | 2 " |

Every one of Warren's tanks has but one outlet, even though the tanks exceed 5' in diameter (P-3, 379a-381a).

5.12 "Scum storage—the space between the liquid surface and the top of the scum retaining device on the outlet, shall be not less than 15% of the total required liquid capacity."

Warren's tanks (P-3) show the following violations by model numbers:

## *Appendix D*

| *Model No.* | *Gallon Capacity* | *15% of Liquid Capacity* | *Equals* | *Actual[3] Space per Drawings* | *Deficiency* |
|---|---|---|---|---|---|
| 800 | 800 | 4'3" or 51" | 7.65" | 7" | .65" |
| 1000 part. | 1000 | 4'6" or 54" | 8.10" | 7" | 1.10" |
| 1000 | 1000 | 4'6" or 54" | 8.10" | 7" | 1.10" |

| *Section of Standards* | *Requirements of "Standards" (indicated by quotations), followed by Violation by Warren tanks of these Standards (P-3, 379a-381a)* |
|---|---|
| 5.13 | "Access openings—in single compartment tanks, the access openings shall be located over the inlet. Access openings shall be at least 16" square or 16" in diameter * * *" |
| | Warren had a single compartment tank with 2 access openings, one over the inlet, one over the outlet. Each opening was only 3" (P-3, 379a-381a), instead of the 16" required as above: |

[3] Actual space is determined by [25" — (16" + 1") or 8"]. Since the top of the scum retaining device (the baffle) is 1" from the underside of the tank, this leaves only 7" between the baffle and the top of the liquid surface.

# APPENDIX "E"

## New Jersey Statutes Directly Involved

N.J.S.A. 58:11-25. Proposed system or facility; compliance with standards of construction

No building permit for the construction of a realty improvement shall be issued by any municipal or other authority in this State nor shall the construction of any realty improvement be begun until the board of health having jurisdiction shall have certified that the proposed water supply system and sewerage facilities for the proposed realty improvements are in compliance with the provisions of this act and the standards for construction of such water supply and sewerage facilities promulgated by the State Department as herein provided and those established by local ordinances, where such local ordinances prescribe higher standards than those promulgated by the State Department. L 1954, c. 199, p. 747 §3.

N.J.S.A. 58:11-33. Covering sewerage facilities; permission

No septic tank, tile field, seepage pit or system or structure designed to provide sewerage facilities to any realty improvement shall be covered from view until the same has been inspected by an authorized representative of the board of health and permission to cover the same has been given by the board or its authorized representative. L. 1954, c. 199, p. 749, §11.

# APPENDIX "F"

## Other Items of Exclusion of Evidence by District Court

The United States District Court for the District of New Jersey failed:

1. To admit evidence to show that the inception of the conspiracy to restrain trade began with the passage of the March 19, 1953 resolution which approved Keyston (Warren) tank or equal (R187a);

2. To admit into evidence a brochure widely distributed by Warren as binding not only Warren, but Roxbury (Exh. P-11, R388a; R125a). This literature showed how Warren sent the trade into the arms of the inspector by the admonishment in italics: "Be Smart! Consult Your Health Officer First!";

3. To admit declarations made on deposition by a Roxbury in a state suit conspirator during the period of a continuing conspiracy, to be used against all the conspirators in the federal suit, the ground for such refusal being that when these declarations were made, the Warren defendants were not parties to the suit (R35a);

4. To admit evidence of short-sizing of tanks by Warren in Roxbury (R44a; R177a, et seq., R12b) and in Randolph Township (T. 332); that would show conspiracy existed between defendants Warren and Roxbury to violate the law concerning sizes of tanks (Sec. 5.1 of "Standards") (R401a), and that fraud had been committed on customers, in Roxbury and elsewhere;

5. To admit evidence that Byram's tanks complied with Chap. 190, Laws of 1954 (N.J.S.A. 58:11-23 et seq.) and that

Warren's tanks did not, as creating an inference that a conspiracy existed to keep out plaintiff's complying products (R44a; R48a; R55a; R56a), while accepting Warren's non-complying tanks, and that Warren had "paid-off" in order to obtain a special dispensation in Roxbury;

6. To consider the constitutionality of an ordinance adopted by Roxbury on December 18, 1958, passed as part of the conspiracy in restraint of trade, in the sale of septic tanks in Roxbury (R10a, R34a);

7. To admit testimony showing defendant Higgins' salary was raised by Roxbury from $200 to $1,800, over a short period of time (R371a);

8. To permit evidence to be adduced under Par. XII(e) of the complaint of plaintiff, which sets out that Warren used gains in interstate commerce to offset losses in wiping out local competitors (R12a);

9. To admit testimony that the rejections of Byram's tanks received the full support of the Roxbury Board of Health (R372a);

10. To accept in evidence, correspondence and drawings of petitioner, regarding acceptability by F.H.A. of its septic tanks (R301a);

11. To permit plaintiff to show violations of the U. S. Criminal Code, 18 U. S. C. Sec. 709, by Warren, in boldly advertising in its brochure, ACCEPTANCE by Veteran's Administration and Federal Housing Administration, as complying with minimum standards of these agencies (Ex. P-3, R233a, R379a);

12. To permit testimony as to whether Warren was in a position to demand cash for its tanks in Roxbury, where it

was specified, which cash was used in its conspiratorial activities (R227a);

13. To admit the "no answer" given by Warren to interrogatory 75(b) propounded to Warren by plaintiff, as follows: "In the alternative, when can your records be examined with respect to determination of accountability of such cash sales?" "A. (No answer)" (R122a);

14. To admit evidence of a reorganization of Warren after 1959, when Dotolo transferred either the assets of Warren or his Warren shares to a company called Warren Industries, Inc., that would show whether Dotolo was testifying in his own behalf or not (R93a);

15. To permit plaintiff to show that Respondent Rogers was a municipal engineer, not a professional engineer, and was not authorized to prepare and certify specifications for septic tank systems (R351a);

16. To permit showing that in the preparation of about 200 specifications for sewage disposal systems, Rogers failed to fill out the form provided by the Board of Health, showing dimension (R334a);

17. To permit plaintiff to go into conflict of interest of having Rogers serve as a member of the Roxbury Board of Health and as an "engineer" who processed 355 of a total of 1657 applications for permits in Roxbury (R329a);

18. To permit evidence of conflict of interest when Rogers, a member of the Board of Health, had failed to certify 250 specifications he had prepared for private home owners or contractors applying for permits for individual sewage systems in Roxbury, which required certification in compliance with Chap. 199, N. J. Laws of 1954, N.J.S.A. 58:11-23, et seq., (R334a);

*Appendix F*

19. To permit evidence of conflict of interest of Curtis Williams, Township Engineer, who also prepared specifications for private home owners or contractors, for individual sewage systems in Roxbury, while working for the municipality (R338a);

20. To permit petitioner to offer evidence that two members of the Roxbury Board of Health (R333a) were also employees of Hercules Powder Co. of N. J., a large taxpayer which conducted a dangerous enterprise in the community.

# APPENDIX "G"

## Warren Defendants' Notice of Motion for Dismissal and Summary Judgment

Please take notice, that the undersigned will move this Court before Honorable Thomas F. Meaney, D. J., at the United States District Court, Federal Building, Newark, New Jersey, on the 24th day of October, 1960, at ten o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order for the following relief:

1. To dismiss this action, with costs, pursuant to Rule 12(b) of the Rules of Civil Procedure, on the ground that the court lacks jurisdiction because it appears on the face of the complaint that the alleged claim does not arise under any act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies as provided under Title 28, Section 1337 of the United States Code.

2. To enter, pursuant to Rule 56 of the Rules of Civil Procedure, a summary judgment, with costs, in the defendants' favor, dismissing the action on the ground that the matter is *res judicata* and that the defendant is entitled to a judgment as a matter of law.

Dated: Oct. 7, 1960

EVANS, HAND, EVANS, ALLABOUGH & AMORESANO
Attorneys for Defendants Warren Concrete Products Co., of N. J., Warren Concrete Tanks Co., Inc., Vincent Dotolo and Richard Dunkle.

By: s/ JOHN W. HAND
A Member of the Firm

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1963.

**No. 840.**

BYRAM CONCRETANKS, INC.,
*Petitioner,*

*vs.*

WARREN CONCRETE PRODUCTS CO. OF N. J., WARREN CONCRETE TANK CO., INC., VINCENT DOTOLO, RICHARD DUNKLE, PATRICK E. HIGGINS, LEONARD J. FARMER, JOSEPH W. ROGERS, HULSE MOONEY, EDISON READ, JOHN W. KLEIN, FRANK M. BERRY, EDWARD C. STIERLI, JOHN EVERLY, E. BLAIR JOHNSON and BOARD OF HEALTH OF ROXBURY TOWNSHIP,
*Respondents.*

## BRIEF FOR RESPONDENTS,

**Patrick E. Higgins, Leonard J. Farmer, Joseph W. Rogers, Hulse Mooney, Edison Read, John W. Klein, Frank M. Berry, Edward C. Stierli, John Everly, E. Blair Johnson and Board of Health of Roxbury Township.**

GEORGE A. VACCARO,
*Of Counsel for Respondents, Patrick E. Higgins, Leonard J. Farmer, Joseph W. Rogers, Hulse Mooney, Edison Read, John W. Klein, Frank M. Berry, Edward C. Stierli, John Everly, E. Blair Johnson and Board of Health of Roxbury Township.*
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Arthur W. Cross, Inc., Law Printers, 71-73 Clinton Street, Newark 5, N. J.—MArket 3-4994

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1963.

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**No. 840.**

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Respondents.

---

## BRIEF FOR RESPONDENTS,

**Patrick E. Higgins, Leonard J. Farmer, Joseph W. Rogers, Hulse Mooney, Edison Read, John W. Klein, Frank M. Berry, Edward C. Stierli, John Everly, E. Blair Johnson and Board of Health of Roxbury Township.**

---

## Counter-statement of Questions Involved.

1. Did the Circuit Court of Appeals err in affirming a judgment of dismissal by the Trial Court where plaintiff's proofs and inferences thereon failed to show a prima facie violation of the Sherman and Clayton Acts?
2. Does the striking of irrelevant and oppressive discovery and the exclusion of objectionable testimony by the Trial Court and the subsequent affirmance thereof by the Circuit Court of Appeals constitute reversible error?

## Counter-statement of the Case.

The 1950 Federal Census listed Roxbury Township's population at 5,707. This 22 square mile municipality situated in the northwestern hilly or mountainous section of New Jersey had neither a public water nor a public sewage system.

In 1951 the Township adopted an ordinance (Ex. P-16, R104b), hereinafter called the 1951 Ordinance, which generally related to standards for the installation of individual sewage disposal systems. Under Section 10 of the ordinance, the Board of Health was given power to grant special written permits for other forms of disposal installations as long as to do so was consistent with the other provisions of the ordinance.

By 1953, pre-cast concrete tanks appeared on the market and came to the attention of the Board of Health as a result of one John Grabovetz, a local developer, requesting permission to use this new type of septic tank in a housing development under construction within the municipality. This new type of pre-cast tank, at that time, was manufactured in Lancaster, Pennsylvania (525); and the Warren defendant was the only distributor of a pre-cast concrete septic tank in the area (617).

At a meeting of the Board of Health on March 19, 1953, the said John Grabovetz submitted a brochure of the pre-cast concrete tank, then known as the Keystone Tank, to

---

**LEGEND:**

1. A page in the transcript of proceedings is cited by number only.
2. Pp designates the petition herein.
3. R....a refers to petitioner's appendix in the Court of Appeals.
4. R....b refers to the joint appendix of respondents in the Court of Appeals.

the Board. Under the authority of Section 10 of the 1953 Ordinance the Board adopted a motion which provided that "* * * Keystone brand of concrete septic tanks, as manufactured by the Warren Concrete Products Company, Warren Pennsylvania, or any concrete tank that equals or exceeds the quality of same, be approved for use by the Board * * *" (R390a).

At this point in the history of the case, the Board of Health was constituted under N. J. S. A. 26:3-9 (as amended L. 1938, c. 105, p. 225, sec. 1 and L. 1953, c. 349, p. 1919, sec. 5) which called for a Board of Health in Townships of not more than 20,000 to consist of the governing body, the township assessor and one physician to be appointed by the Township Committee. By virtue of this New Jersey Statute, defendants, Hulse Mooney, the then tax assessor, and Edison Read, then one of the Township Committeemen, were members of the Board of Health, with Mooney serving on the Board until February 1959 and Read until July 10, 1958. The physician and the other four members of the governing body who constituted the remaining 5/7ths of the board, at that time, were not made defendants in this suit.

The term of service of each member of the local Board who is a defendant herein is set forth in a chart at R145b of the joint appendix of respondents.

Defendant Patrick Higgins, the only Roxbury Township defendant and non-member of the Board, became an acting sanitary inspector for the Township in 1948. He obtained his license as a sanitary inspector second grade from the State of New Jersey in 1950 (R363a, R364a) and served in that capacity on a part-time basis until August 1, 1963.

On September 1st, 1954, "The Realty Improvement Sewage and Facilities Act" (1954), N. J. S. A. 58:11-23 et seq., was enacted by the State of New Jersey (hereinafter referred to as the 1954 Act). It was the apparent intention of this Act to protect the public health by the creation of minimum standards for the installation of sewerage systems, the demonstration to the local Board of Health that each system had been planned to comply with these minimum standards and finally that each installation actually did comply with such standards. The significant portions of the 1954 Act provided in part:

1. That no building permit for construction of a "realty improvement" could be issued by any municipal or other authority in the State nor construction begun until the local Board certified that the proposed water supply system and sewerage facilities complied with the provisions of the 1954 Act, the standards promulgated by the State Department of Health and such higher standards as are provided by local ordinance. (N. J. S. A. 58:11-25).

2. That where a local Board has an employee of the status of a licensed health officer, sanitary inspector first grade or a professional engineer, such personnel must certify to the Board that the application and accompanying engineering data relating to the proposed water system and sewerage facilities are in compliance with the Act and the standards; but if the Board has no personnel as described, it may issue certification if applicant files with the Board a certificate by a professional engineer stating that the proposed water supply system and sewerage facilities are in compliance with the Act and the standards. (N. J. S. A. 58:11-26).

3. For the promulgation of minimum standards for the installation of every "realty improvement" by the New Jersey State Commissioner of Health (N. J. S. A. 58:11-36).

4. For inspection of any particular installation, prior to covering the same from view, by the authorized representative of the local Board. (N. J. S. A. 58:11-33).

In Roxbury Township, the authorized representative for the inspection of installations, as required by the aforesaid section of the Act, was defendant Higgins. His duty was to make inspections of all installations including built in place units, metal tanks, precast concrete tanks and all other component parts of the system. This authority is by virtue of N. J. S. A. 26:3-19, 26:3-21 and 26:3-31(g).

On December 7, 1954, the New Jersey State Commissioner of Health promulgated, "Standards for the Construction of Sewerage Facilities for Realty Improvements" which served to supersede the 1951 Ordinance as amended.

It was after all of the above had transpired that in late 1954 Concrete Tanks, Inc., as plaintiff corporation was originally named, came into existence as a New Jersey corporation (358) with its principal place of business at the office of Frankel and Frankel, Esqs., 262 Main Street, Paterson, New Jersey. Its officers consist of Edmund Frankel, as President and principal stockholder, and Edmund's father, mother and brother (363-365).

It was not until 1955 that plaintiff commenced its operations in Mine Hill Township, New Jersey, a municipality adjacent to Roxbury Township (391). In its first year, it was operated by Edmund Frankel with one part-time

helper who worked two hours a day (R25b). That year plaintiff sold thirteen tanks (R32b) and its volume of sales increased to 226 tanks in 1959 (R31b, R32b).

The plaintiff together with other various manufacturers of pre-cast concrete tanks sold their tanks for installation in Roxbury Township (R101b); and according to Edmund Frankel (R43b), "quite a few" of plaintiff's tanks were sold and installed in Roxbury Township. Other plaintiff's products, including distribution boxes, seepage pits and septic tank covers, were also sold and installed in the Township (R38b-R39b).

Then in 1957, some individual defective septic tanks manufactured by plaintiff were individually rejected for installation in the municipality.

The first rejection occurred in 1957 on property owned by Elmer Dante. Albert Warga was the contractor for construction at the site. The sanitary inspector was notified to inspect the installation of the sewerage disposal system. Defendant Higgins, in making his inspection, determined that the Byram pre-cast concrete septic tank, a two piece coffin shaped tank, was cracked at the top. He refused to approve the installation (R101b).

In the fall of 1957, development of a subdivision tract known as Roxbury Hill was undertaken. The contractor for the individual sewage disposal systems for certain lots in the tract ordered some Byram pre-cast concrete septic tanks which were delivered to the site. Upon inspection, the Sanitary Inspector found that the Byram septic tanks were cracked and of poor quality. At least one was cracked lengthwise. The Sanitary Inspector then proceeded to con-

duct a water test in order to determine watertightness. Leakage clearly appeared. Thereafter, the Sanitary Inspector advised that he would not approve the use of the particular Byram units delivered to the site for installation and six of plaintiff's tanks were removed from the site (R95b-R98b).

A Byram pre-cast concrete tank was also rejected by the engineer who designed the job at the Horseshoe Milk Bar installation (R375a).

In the Spring of 1958 the Sanitary Inspector examined two tanks which were to be installed at the Merry Heart Nursing Home, Main Street, Succasunna. These tanks were two Byram units. Inspection of these units revealed that they were cracked in a manner similar to the Byram units previously delivered to the Roxbury Hill subdivision tract. The Sanitary Inspector advised the owner of the nursing home that he would not approve the use of those particular tanks because of their defective condition (R96b-R97b).

The above rejections constituted the total rejections of the plaintiff's products within the Township of Roxbury throughout these many years; and each rejection was made on an individual basis resulting from defective manufacturing or handling.

Out of these isolated instances the plaintiff began a series of activities and law suits as follows:

First, there was an exchange of letters from November 13, 1957 through December 10, 1957, between the law firm of Frankel and Frankel, representing plaintiff, and Higgins relating to the rejection of tanks and particularly the tank

supplied by plaintiff for the Dante job (Ex. P-15, R391a-R399a). In Higgins' letter to Frankel and Frankel of December 10, 1957 (Ex. P-15, 399a), Mr. Higgins directed Frankel and Frankel to write to defendant Rogers, as Chairman of Sanitation, Roxbury Board of Health. Other than a brief telephone call to Rogers by Leopold Frankel, there was no contact with the local Board. There was no attempt to obtain a hearing before the local Board. There was no action taken as provided under the *Revised Rules of the New Jersey Courts*, Rule 4:88, Procedure in Lieu of Prerogative Writs (R39b-R42b).

Then, in May of 1958, Byram Concretanks, Inc., instituted suit in the Superior Court of New Jersey, Passaic County, Chancery Division, Docket No. C-1842-57 against Higgins, only.

After the institution of this state court action, the local Board met at a special meeting on May 13, 1958, and after determining that Higgins had acted in good faith under the Act, adopted a motion (hereinafter called the 1958 motion) (R404a-R405a), wherein recommendation was made to the Township Committee to provide for the defense of Higgins in the state court action.

Thereupon, the plaintiff amended its complaint in June, 1958 to also include the local Board, Farmer, Rogers, Mooney, Read, Klein and Berry, who were then six of the seven members of the local Board.

A second amended complaint was served in September 1958. All of the allegations of the original and amended complaint were contained in the second amended complaint (R128b). These complaints contained claims of fraud,

maliciousness, bad faith, harassment and vilification and sought to establish tortious interference with the business of the plaintiff in the installation of pre-cast concrete septic tanks in Roxbury Township. The complaints also challenged the validity of the 1951 Ordinance and 1953 motion.

Meanwhile, on December 18, 1958, the Roxbury Board of Health adopted an ordinance which reaffirmed the standards promulgated by the State Commissioner of Health pursuant to the 1954 Act. In Section III of this ordinance, the Board prescribed higher standards and established a procedure to facilitate application for certification by the Board as required by the 1954 Act (Ex. P-16, R108b).

In continuance of its course of action, the plaintiff next on April 21, 1959 sent a letter to the New Jersey State Commissioner of Health. The plaintiff characterized its letter as a "Specification of Charges against the Roxbury Board of Health" (R122b).

At about this period of time, the governing body of Roxbury Township by virtue of N. J. S. A. 26:3-9 and 26:3-3 (R86b) adopted an ordinance in January 1959 replacing the "governing body and tax assessor" form of Board with a "citizens Board", composed of four citizens of the municipality and one member of the governing body.

On February 19, 1959, in accordance with this ordinance, defendants, Edward G. Stierli, a pharmacist, John Everly, a bio-chemist, and E. Blair Johnson, maintenance head of the Township school system, came on the Board for the first time and were sworn as the first members of the "citizens Board" (R81b, 86b, 74b). Ten months later, on December 12, 1959 the plaintiff filed its complaint in

this cause against every defendant including Stierli, Johnson and Everly, as well as the Warren defendants.

March 15, 1960 was the date scheduled for the trial of the state court action. At that time, plaintiff refused to proceed with trial and Judge Elden Mills of the Morris County Court (the venue having been changed to Morris County on defendant's motion) dismissed the action with prejudice. No appeal was taken.

Plaintiff then, on July 13, 1960, filed a complaint with the Federal Trade Commission (R125b) charging that the various Roxbury Defendants aided the Warren Defendants in achieving a monopoly in Roxbury Township. The Federal Trade Commission on the basis of the facts developed after making its investigation advised the plaintiff that it contemplated no further action (R127b).

In November 1962, three years after the institution of this suit, the matter was finally moved for trial. The defendant members of the Board of Health, with the exception of Stierli who meanwhile had accepted a reappointment, were no longer serving on the Board either because their term had expired or because of occupational or other personal reasons.

The evidence revealed that not one of these defendants of the Board of Health, up to and including the institution of this suit, had met or knew any of the Warren defendants (R68b, R69b, R74b-77b, R80b, R87b, R88b, R89b, R90b, R102b).

Plaintiff's president, in the action sub judice testified (R42b, R43b, R172a, R173a) that the local Board defendants were included in this action and the state court action

because they "backed up" Higgins by passing the 1958 motion to provide for his defense, because the local Board passed the 1958 Ordinance and because plaintiff wanted to include "anybody who could possibly be involved".

## ARGUMENT.

### I.

**Plaintiff's exceptions to the findings and conclusions of the several courts below are frivolous and unsupported by the record.**

Taking a number of circumstances and occurrences in the Township of Roxbury, commencing in the year 1951 with the passage of an ordinance relating to individual sewerage disposal systems, and then rhetorically manipulating the attendant facts so as to suggest bribery, corruption and tortious interference with its business activities, plaintiff, however, after six years of litigation has been unable to produce one particle of evidence that might remotely suggest wrong-doing by these defendants in contravention of any federal laws or state laws. Despite its cliches that the "Roxbury market" was closed or that "plaintiff was denied the equal protection of the laws", the undisputable fact remains that plaintiff since its inception in late 1954 (358) has sold and installed "quite a few" of its septic tanks (R43b, R44b) in addition to selling and installing its other products in Roxbury Township (R38b-R39b).

Although plaintiff presents no grounds whatever to support its assertion that defendants realized "untaxed

income" the fallacy of this charge is most apparent in the statement of plaintiff's counsel to Judge Coolahan of the District Court in opposition to motions for dismissal at the conclusion of plaintiff's case on December 10, 1962, at which time, Mr. Leopold Frankel stated that, "three defendants * * * in my opinion * * * do not belong in this conspiracy because they were made members of the Board of Health merely for window dressing". The three defendants named were John H. Everly, Edward C. Stierli and E. Blair Johnson. When the Court replied, referring particularly to Johnson, that he was, nevertheless, made a defendant and charged with accepting bribes, counsel answered: "* * * I didn't know what this defendant had to do with it at that time. I could not know and therefore we had to make them all defendants. And, I say, sir, that if I have done these three people an injustice I certainly would like to make up for it" (1249-1250).

Similarly, although bribery was made an issue at trial, nonetheless, counsel admitted to the Court that plaintiff had no direct evidence that any officials were bribed (R16b-R17b).

Plaintiff, seemingly, would imply that the District Court refused to take cognizance of, and summarily dismissed, plaintiff's several causes of action. The record in this case, however, attests to the many days of trial, the production of numerous exhibits and nineteen witnesses, eleven of whom were the defendants, with the end result that the alleged causes of action remained glaringly naked of any proof that might factually support them. And, although the District Court, in its opinion, made reference to *Parker v. Brown*, 317 U. S. at page 341 (1943), Judge Coolahan

clearly stated that, "the prime motive for dismissing this action is the fact that the evidence was insufficient to show a combination or conspiracy in restraint of trade or a restraint or monopolization of trade or commerce under the Sherman and Clayton Acts (case cited). In fact, there has been no proof of any conspiracy whatsoever."

It is submitted that the trial court, in its opinion, cited the cases of *Klor's* v. *Broadway Hale Stores*, 359 U. S. 207 (1959) and *Radiant Burners* v. *Peoples Gas Co.*, 364 U. S. 656 (1961), for the proposition that the acts complained of must interfere with the natural flow of interstate commerce to prove violation of the anti-trust statutes; and that the Court did not make reference to these cases to support the concept that the complainant's commerce must be affected before a violation can be shown under the Sherman Act as the plaintiff would appear to contend in its brief at page 16.

Defendants do not dispute the law enunciated in the cases adduced by plaintiff on the subject of damages. Again, it is submitted, however, that plaintiff would appear to confuse the rule relating to the measure of proof needed to establish that it had in fact suffered some degree of damage which necessarily or proximately resulted from the wrongful acts complained of with the rule relating to the type of proof admissible on the question of ascertaining the amount or extent of such damage once the fact of damage has been shown. In the latter instance, although the proofs as to the extent or amount of damage need not be precise or certain, nonetheless, complainant is not relieved of the burden of first showing that the tort complained of had in fact occurred and that the violation did necessarily

result in at least some damage. *Bigelow* v. *R. K. O. Radio Pictures*, 327 U. S. 251, 264 (1946); *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 562 (1931); *Eastman Kodak Co.* v. *Southern Photo Material Co.*, 273 U. S. 359 (1927).

In the case at hand, plaintiff would urge this Court to permit a jury to assess damages against these defendants solely on the basis of conjectures formed by an accountant (R360a-R361a) unsupported by any evidence whatsoever that because of the wrongful acts of these defendants, plaintiff did sustain a loss. That there must be a basis for the suppositions of the expert witness is firmly established in *Schwabe Inc.* v. *United Shoe Machinery Corp.*, 297 F. 2d 906, 909 (2d Cir. 1962); cert. denied, 369 U. S. 865 (1962).

## II.

**All proofs together with all favorable inferences reasonably drawn therefrom failed to create a fact issue.**

Neither the testimony of the nineteen witnesses nor the numerous and varied exhibits introduced by plaintiff gave rise to any question that would be cognizable by a jury. The proofs, being undisputed, had shown that plaintiff had sold and installed its septic tanks in Roxbury Township (R43b), just as other manufacturers were able to sell and install their tanks in the municipality (R101b); that, as testified to by its president, Edmund Frankel, plaintiff had sold and installed quite a few tanks in Roxbury Township (R44b) as well as having sold and installed its other commodities (R38b, R39b); and that, the only disapprovals in

connection with the installation of plaintiff's products, since the commencement of its manufacturing operations in 1955, occurred on four separate occasions and involved a total of ten septic tanks, nine of which were individually rejected by the sanitary inspector Higgins, because of physical defects (R95b, R96b, R97b, R101b), and one of which was rejected by the engineer who designed the job for which the tank was ordered (R375a).

Moreover, the plaintiff has placed an unreasonable and an unwarranted construction on those portions of the record cited in its brief (R170a, R273a, Ex. P-3, R379a, R190a, R191a) to support its contention that a prima facie, "common design, purpose and understanding" was shown to exist between these defendants and the Warren defendants. The proofs unequivocally prescribe the antithesis of plaintiff's argument, as illustrated by the fact that none of the Roxbury defendants had ever met or had ever known of the Warren defendants prior to the institution of this suit (R68b, R69b, R77b, R80b, R87b, R88b, R89b, R90b, R102b). Thus, as a matter of law, there was no basis for submission of this case to the jury. Rule 50(a), *Fed. R. Civ. P.; Schad* v. *Twentieth Century Fox Corp.*, 136 F. (2d) 991, 996 (3rd Circ., 1943).

## III.

**The Court of Appeals did not base its determination on theories of collateral estoppel or res judicata and did not err.**

The plaintiff urges this Court to grant certiorari on the proposition that the United States Circuit Court of Appeals in affirming the determination of the trial court dismissing plaintiff's complaint, did so as a result of an erroneous determination on its part that the Sherman Anti-Trust action brought in the Federal Court was barred by res judicata or collateral estoppel.

A plain reading of the opinion of the Circuit Court reveals that the first paragraph of the opinion is devoted to a brief history of the case wherein the court alluded to the prior action against some of the individual defendants in the Superior Court of New Jersey, while the second paragraph states, in part, that the basis of the Circuit Court's determination was that the District Court did not err in its conclusion that plaintiff failed to prove its case.

Since none of the defendants at any time urged a theory of res judicata or collateral estoppel to the Circuit Court and since the Circuit Court so obviously in the second paragraph of its opinion spells out precisely the basis for its determination, which basis has nothing to do with res judicata or collateral estoppel, it would seem that plaintiff's theory is fanciful and ill-founded and does not serve as a proper basis for certiorari.

## IV.

**The discovery rulings of the Trial Court were proper and followed established authority.**

The plaintiff asks for certiorari in reference to the Roxbury defendants on the basis of the existence of an important question of discovery under Federal Rule 34 not settled by the United States Supreme Court.

The Circuit Court, unimpressed by plaintiff's discovery demands, characterized them as, "so lacking in merit as to require no discussion" (Pp35).

The discovery demanded by plaintiff against the Roxbury defendants poses no new Federal question, but simply demonstrates the well accepted principle that the Federal Courts under *Fed. R. Civ. P. 33* by reference to *Fed. R. Civ. P. 30(b)* will protect parties from annoyance, embarrassment and oppression.

Plaintiff's interrogatories (R25a-R28a) (R2b-R9b) required from each Board of Health defendant complete and exhaustive accountings of the defendants' financial positions as well as their families for the years 1955 through 1960.

With no evidence of conspiracy against any of the members of the Board of Health or Higgins, with an utter disregard of the fact that three of the Board of Health defendants did not become members of the Board until 1959 (R81b, R86b, R74b), that another defendant first became a member in 1958 (R330a, R331a), and that all of these members served for terms of ranging periods, plaintiff

desires to expose confidential and personal information which could not, in any way, serve to advance the determination of the case.

Edmund Frankel, President of plaintiff corporation, verbalized that the plaintiff's case was based on suspicion alone when he stated the reasons for the joining of the local board and the individual board members in this and the state action (R42b, R43b, R172a, R62b, R68a, R69a).

Further in approximately six years of litigation involving both the state and federal courts, the plaintiff came up with not one iota of evidence of conspiracy, dishonesty or bribe taking by these defendants.

In the case of *Waldron* v. *British Petroleum Co. Ltd.*, 4 F. R. Serv. 2nd 30(b) 23, Case 1 (D. C. S. D. N. Y. 1961), a private anti-trust case, the court held that even though summary judgment in favor of one defendant is not appropriate in view of the strict policy in force in the Second Circuit with respect to convocation of summary judgment procedure, the court would closely regulate the plaintiff's pre-trial discovery as to that defendant and would curtail the usual Federal rules permitting "fishing expeditions" when the plaintiff's case against the particular defendant is based on little more than suspicion and inference, as appeared from extensive pre-trial examination of plaintiffs conducted by the defendant.

Parties are therefore protected from invasion into their confidential affairs unless there is a clear showing of relevancy. *Zenith Radio Corp.* v. *R. C. A.* (D. Del. 1952), 106 F. Supp. 561, 17 F. R. Serv. 33.352, Case 1.

To otherwise justify plaintiff's position, the plaintiff argues that such inquiry was permitted in the cases of

*Jelaza* v. *U. S.*, 179 F. 2d 202 (4 C. C. A. 1950) and *Holland* v. *U. S.*, 348 U. S. 121 (1955). These cases cited are not authority for plaintiff's proposition as both actions were income tax evasion cases where the net worth formula was used to show that the defendants increase in net worth over a period of time was greater than income reported. The purpose for the use of this formula is to create the reasonable inference that the increase in net worth above an amount justified by reported income is derived from income that was not reported. In the case sub judice, a reasonable inference pointing to a conspiracy could not result from the discovery demanded. These requested probes can only lead to further burdensome, endless and fruitless invasions of an inquisitorial nature, a result abhorrent to the discovery procedures as well as to justice.

## V.

**The evidence rulings of the Trial Court were proper.**

At the trial level the Court made various rulings on evidence which the Circuit Court held to be proper. Of this group, plaintiff has presented in Appendix "F" of its petition those rulings it now urges as a "departure of judicial proceedings" (Pp25).

A brief review of that portion relating to the Roxbury defendants reveal the trial court rulings to be correct.

1. Number 1 of plaintiff's Appendix "F" (Pp42): The trial court may in its discretion exclude matters so remote in time as to fail to be evidential. *Park Neponset Corp.* v. *Smith*, 258 F. 2nd 452 (1st Cir. 1958).

2. Number 2 of plaintiff's Appendix "F" (Pp42): The plaintiff failed to offer any evidence connecting P-11 with the Roxbury defendants. However, since P-11 was admitted into evidence and since the case was decided on defendants' motions to dismiss, there could not in any event be harmful error. (R125a) Fed. R. Civ. P. 61.

3. Number 3 of plaintiff's Appendix "F" (Pp42): Use of declarations made in depositions taken in the state court case were properly excluded from use against all of the defendants in this action as the parties and issues were different. *Fed. R. Civ. P.* 26d; *Hertz v. Graham*, 23 F. R. D. 17 (S. D. N. Y. 1958); *First National Bank in Greenwich* v. *National Airlines, et als.*, 22 F. R. D. 46 (S. D. N. Y. 1958); *Wolf* v. *United Air Lines*, 12 F. R. D. 1 (M. D. Pa. 1951); *United States* v. *Silliman*, 6 F. R. D. 262 (D. N. J. 1946).

4. Number 5 of plaintiff's Appendix "F" (Pp42): Testimony of an expert witness interpreting provisions of a statute is improper as it would constitute opinion evidence involving conclusions relating to the meaning of the statute. *Whitson* v. *Aurora Iron & Metal Co.*, 297 F. (2) 106 (C. C. A. 7th) 1941; *Manter* v. *Bay State York Company*, 159 F. Supp. 670 (U. S. D. C. Mass.) 1958; *Huff* v. *U. S.*, 273 F. (2) 56 (U. S. C. A. 5th Circ.) 1959.

5. Number 6 of plaintiff's Appendix "F" (Pp43): The plaintiff has not presented a question relating to the exclusion of evidence but rather objects to the court's refusal to consider the constitutionality of a municipal ordinance and appears not to urge this as a ground for the issuance of certiorari.

6. Numbers 7 and 20 of plaintiff's Appendix "F" (Pp42 and 45): It is inconceivable that an increase in Higgins' salary from $200.00 per year to $1800.00 per year, as alleged by plaintiff over the last twelve year period, or the fact that two of the defendants worked for Hercules Powder Company of New Jersey, could have any relevancy or materiality in this action.

7. Number 9 of plaintiff's Appendix "F" (Pp43): The actual question propounded of Higgins was improper as it called for a conclusion (1209). *Thatenhorst* v. *U. S.*, 119 F. (2) 567 (C. C. A. 10th Circ.) 1941; *Wigmore on Evidence*, 3rd Ed., Sec. 1970. The question, however, is moot as the witness did not know the Board's reaction.

8. Numbers 15, 16, 17, 18 and 19 of plaintiff's Appendix "F" (Pp44): Since there were no offers of proof in relation to the exclusion of testimony relating to alleged conflicts of interest, the purpose of the testimony is unknown and the questions therefore are not properly preserved for appeal. The general allegation that Rogers failed to fill out or certify forms, and that he and Curtis Williams prepared specifications for sewerage disposal systems, while acting as a member of the local board and township engineer, respectively, lacks any probative weight or value in terms of an attempt to prove a violation of the Sherman Act. *Parmalee Transportation Company* v. *Keeshin*, 292 F. (2) 794, Cert. Den. 368 U. S. 944 (1961), Reh. Den. 368 U. S. 964 (1962).

Consistently through its objections set forth in Appendix "F", plaintiff failed to make offers of what it expected to prove. Since the significance of the excluded evidence is less than obvious, an offer of proof was necessary to

preserve the questions. 5 Moore's Fed. Practice 2nd, 1351. *Hoffman* v. *Palmer*, 129 F. (2) 976, Aff'd on other grounds (1942), 318 U. S. 109, 63 S. Ct. 477, 87 L. Ed. 645, 144 A. L. R. 719; *Johnson* v. *Hill*, 274 F. (2) 110 (U. S. C. A. 8th Circ.) 1960.

## Conclusion.

**Petitioner having failed to show cause, it is respectfully requested that the petition for a writ of certiorari be denied.**

Respectfully submitted,

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JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1963.

**No. 840.**

BYRAM CONCRETANKS, INC.,

*Petitioner,*

*vs.*

WARREN CONCRETE PRODUCTS CO. OF N. J., WARREN CONCRETE TANK CO., INC., VINCENT DOTOLO, RICHARD DUNKLE, PATRICK E. HIGGINS, LEONARD J. FARMER, JOSEPH W. ROGERS, HULSE MOONEY, EDISON READ, JOHN W. KLEIN, FRANK M. BERRY, EDWARD C. STIERLI, JOHN EVERLY, E. BLAIR JOHNSON and BOARD OF HEALTH OF ROXBURY TOWNSHIP,

*Respondents.*

## BRIEF FOR RESPONDENTS, WARREN CONCRETE PRODUCTS CO. OF N. J., WARREN CONCRETE TANK CO., INC., VINCENT DOTOLO AND RICHARD DUNKLE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1963.

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**No. 840.**

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BYRAM CONCRETANKS, INC.,

Petitioner,

*vs.*

WARREN CONCRETE PRODUCTS CO. OF N. J., WARREN CONCRETE TANK CO., INC., VINCENT DOTOLO, RICHARD DUNKLE, PATRICK E. HIGGINS, LEONARD J. FARMER, JOSEPH W. ROGERS, HULSE MOONEY, EDISON READ, JOHN W. KLEIN, FRANK M. BERRY, EDWARD C. STIERLI, JOHN EVERLY, E. BLAIR JOHNSON and BOARD OF HEALTH OF ROXBURY TOWNSHIP,

Respondents.

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## BRIEF FOR RESPONDENTS, WARREN CONCRETE PRODUCTS CO. OF N. J., WARREN CONCRETE TANK CO., INC., VINCENT DOTOLO AND RICHARD DUNKLE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT.

## Counter-statement of Questions Presented.

1. Did the Court of Appeals err in affirming the District Court's dismissal of the Petitioner's case where there was no showing of a violation of the Anti-Trust Laws nor any evidence of damage to the Petitioner which was caused by the Respondents?
2. Did the Court of Appeals err in affirming the District Court's discretionary rulings on evidence and discovery matters?

## Legend.

The individual respondents will be referred to herein by last name only.

Warren Concrete Products Co. of N. J., Inc. will be referred to herein as Warren Products.

Warren Concrete Tank Co., Inc. will be referred to herein as Warren Tank.

Dotolo, Dunkle, Warren Products and Warren Tank will be collectively referred to herein as Warren or Warren Respondents.

Warren Products and Warren Tank will be collectively referred to herein as Warren Companies.

The Board of Health of Roxbury Township will be referred to herein as the Local Board.

Higgins, Farmer, Rogers, Mooney, Read, Klein, Berry, Stierli, Everly, Johnson and the Local Board will be collectively referred to herein as Roxbury Respondents.

15 U. S. C. A. § 1 is referred to herein as Section 1.

15 U. S. C. A. § 2 is referred to herein as Section 2.

The ordinance of the Township of Roxbury adopted by the Board of Health of the Township of Roxbury on December 18, 1958, is referred to herein as The 1958 Ordinance.

Standards for the Construction of Sewerage Facilities for Realty Improvements, promulgated December 7, 1954, by the New Jersey State Department of Health under the provisions of Chapter 199, P. L. 1954 (see e.g., Appendix "D," Pp38-Pp40), are referred to herein as State Standards.

The abbreviations set out in the Legend in the Petition (Pp1) will also be followed herein.

## Counter-statement of the Case.

### 1. Prior Proceedings.

This fanciful anti-trust litigation concerns the business of the manufacture and sale of concrete septic tanks as carried on in New Jersey by two local corporations. In particular, the action deals with the sale of septic tanks in one municipality, the Township of Roxbury, which is located in the northern New Jersey county of Morris.

The genesis of the matter was the frustration of the Petitioner's efforts at delivering 11 particular septic tanks into Roxbury Township for installation and use in sewage disposal systems there. See, e.g., Conclusion (Pb46). The Petitioner claims that installation of these tanks was arbitrarily and capriciously prohibited by Higgins, the Sanitary Inspector of Roxbury Township (R126a, R128a-R132a, R134a-R141a). These rejections resulted in a *cause celebre* that has continued unabated in the courts and agencies of the State of New Jersey and the Federal Government for nearly six years.

First, in May 1958, Petitioner brought suit in the Superior Court of New Jersey against Patrick E. Higgins. (Affidavit of John R. Miller, in Opposition to Plaintiff's Motion to Compel Answers to Interrogatories, filed July 25, 1960.) Subsequently, in that action, Petitioner added the Local Board, as a body, and each of its members, individually, as parties defendant (*Id.* at 4). The cause, denominated as an "action for injunctive and other relief for interference with the business of the plaintiff, etc.," was pretried in November, 1959 (*Id.* at Exhibit A, p. 1).

During the course of these proceedings, in April, 1959, the Petitioner filed charges with the New Jersey State Commissioner of Health against the Local Board and Higgins (R122b-R124b)..

Then, a month after the State case pretrial, came the institution of the instant anti-trust suit, containing all the same charges against the Roxbury Respondents as were set forth in the New Jersey Superior Court action, as well as new charges against those Respondents, and also bringing in as parties for the first time the Petitioner's competitors, the Warren Respondents, who were now alleged to have been responsible for the rejection of Petitioner's tanks in Roxbury Township because of their alleged bribery of and conspiracy with the Roxbury Respondents in violation of Section 1 of the Sherman Act. The Complaint also rung in against the Warren Respondents charges of monopoly in violation of Section 2 of the Sherman Act. Although all of the specific allegations of the Complaint had reference to events in Roxbury Township, there were also vague, general charges of wrongful conduct by Warren outside of Roxbury Township (R11a-R15a).

Shortly, thereafter, on April 1, 1960, the Petitioner, having failed to prosecute the New Jersey Superior Court action which was then nearly two years old, suffered a dismissal with prejudice of that case. Affidavit of John R. Miller, *supra* at 3.

Petitioner's next move was to try to bring the fire of the United States Government on the Respondents. In that connection, it made a complaint to the Federal Trade Commission on July 13, 1960 (R125b-R126b). There is no rec-

ord that either the Federal or State governments ever felt disposed to dignify the Petitioner's charges by taking any formal action against the Respondents. See, e.g., R127b.

After lengthy and disputed pretrial maneuverings, including an abortive attempt by the Petitioner to mandamus Judge Meaney, *Byram Concretanks, Inc.* v. *Meaney*, 286 F. 2d 170 (3rd Cir. 1961), this matter came on for trial on November 27, 1962.

The Petitioner called as its witnesses its President (Edmund), a representative of the New Jersey Department of Health, a representative of the New Jersey Department of Labor and Industry, a representative of the Federal Housing Authority, three professional engineers, a certified public accountant and a competitor. It also subpoenaed ten of the Respondents as its witnesses. None of the testimony gave any credence to Petitioner's anti-trust charges. At most, it showed a petty dispute between the parties which belonged for settlement elsewhere than in a Federal forum. Accordingly, after eight days of trial, the case was dismissed at the completion of the Petitioner's proofs as a "glaring example of vicious, harassing and vexatious litigation" (R103b). The Third Circuit Court of Appeals affirmed the dismissal per curiam. *Byram Concretanks, Inc.* v. *Warren Concrete Products Co. of N. J.*, 323 F. 2d 994 (3d Cir. 1963).

## 2. Facts.

The Petitioner's zeal in carrying on this expensive and fruitless crusade against the Respondents can, perhaps, only be understood by observing Petitioner's counsel's own interest in the case.

The Petitioner was organized in late 1954 by Edmund Frankel ("Edmund"), a former laborer and mason contractor (T. 361-T. 362), with the help of his father (R22b-R23b), Leopold Frankel, Esquire ("Leopold"), the Petitioner's attorney and counsel in this suit and the other proceedings arising out of the events upon which this litigation is based (T. 73-T. 74). The stockholders of the Petitioner are Edmund, Leopold, Esther Frankel, Esquire (Edmund's mother, who is also a lawyer and a partner in Frankel & Frankel, Esquires, with her husband, Leopold) and Harold Frankel, Edmund's brother (T. 363-T. 364). The four Frankels also hold the officerships in the Petitioner.

All of the Petitioner's office work is done by Leopold's secretary in his law office (R26b). Edmund, allegedly the sole owner of the Petitioner (Pb3), has nothing to do with the office work and does not even know if his father's secretary is remunerated by the Petitioner (R26b-R27b). He is equally non-conversant with the financial structure of the Petitioner (R22b-R24b).

The involvement of the Warren Respondents in the concrete septic tank business with which this case is concerned began in 1952 when Dotolo, a former building supplies salesman (T. 524), and Dunkle organized Warren Products to act as a distributor in New Jersey of precast, machine-spun, *round* concrete septic tanks, known as Keystone tanks (T. 614, T. 686), then being manufactured by Mr. Walter W. Swarr, of Lancaster, Pennsylvania (T. 525) who made these tanks on a machine leased from Warren Concrete Products Company of Pennsylvania ("Warren of Pennsylvania") (R287a). Like the Petitioner (Pp6), Warren started out on a very small scale (T. 524-T. 527).

In 1952, precast concrete septic tanks had only shortly then come into vogue. Prior, steel tanks and septic receptacles built in the ground out of cinder blocks were the commonplace (T. 783-T. 784) in areas where public sanitary sewerage facilities were not available. As late as 1953, Warren Products was the only supplier in its area which offered a precast concrete septic tank (T. 617).

Using various locations in northern New Jersey for its home base (T. 524, T. 526-T. 527), Warren Products acted as a distributor for Swarr's Keystone tanks until 1955 (T. 526).

The second corporation, Warren Tank, was formed by Dotolo and Dunkle in 1954 (T. 519). Eventually, Warren Tank became the sales organization for the enterprise and Warren Products became the manufacturing entity. Dunkle ran the manufacturing plant and the production end of the business; Dotolo was in charge of everything else (R196a-R197a, R56b).

Precast concrete septic tanks first became of interest in the Township of Roxbury, New Jersey in early 1953. Previously, only steel and built-in-place tanks were allowed in the Township (R105b).

In connection with his efforts to promote the sale of his Keystone tanks which sold at a cheaper price than the more commonly used steel tanks, Dotolo solicited as a prospective customer Mr. John Grabovetz, a builder in Roxbury Township, who theretofore had used metal tanks in his housing developments in that area. Grabovetz indicated

that he might be interested in purchasing Warren's Keystone tanks if Roxbury Township would change its regulations and approve precast concrete tanks for installation. Accordingly, Dotolo gave Grabovetz some literature, including specifications and drawings, concerning Keystone tanks (R58b-R59b).

Subsequently, on March 19, 1953, Grabovetz appeared at a meeting of the Board of Health of Roxbury Township to ask if Dotolo's concrete tanks could be used in the Township. He gave the Local Board information about the details of the tanks and, after due consideration, the Local Board, by appropriate resolution, ruled that these concrete tanks, or their equals, were approved and that Sanitary Inspector was authorized to issue permits for their use (R390a). Dotolo was not present at the meeting (R58b) and knew nothing about what went on there (T. 611-T. 615). Thereafter, for a short time Warren may well have enjoyed an absolute monopoly of precast concrete septic tank sales in Roxbury Township simply because no one else was offering that type of tank for sale in the Roxbury area (T. 617).

In early 1955, being then located at Saddle Brook, New Jersey (T. 527), Warren Products ceased being a distributor for Swarr (T. 525), got its own tank making machine on a lease from Warren of Pennsylvania (T. 686, R286a-R287a), and began manufacturing and distributing the same type of Keystone tank as had previously been supplied to it by Swarr (R139a-R191a, T. 614).

The Warren Companies' business has continued apace since 1955. In February-March 1959, Warren's manufacturing operations were moved to Waretown, New Jersey (R57b), and their administrative offices to Wayne, New

Jersey (T. 552-T. 553). No one disputes that the Warren Companies have been a successful business venture. However, the Petitioner's suggestions that Warren's accomplishments have come as a result of illegal actions rather than as the fruit of long, grueling and expensive years of entirely proper business activities, are absolutely baseless and unwarranted.

Further specific references to pertinent facts and testimony are made in the following Argument.

## ARGUMENT.

The following Argument simply shows (1) that the instant Petition is presented to the Court on the basis of a recitation of facts which is unbelievably at variance with the proofs presented at trial and which has been unwarrantedly twisted by the Petitioner to suit its own purposes; (2) that this case is such an aberration from the normal anti-trust suit that it is irreconcilable with the law and prior decisions and, therefore, was properly dismissed by the trial court; and (3) that the District Court's discretionary rulings during pretrial and trial proceedings were proper.

## POINT I.

**The Petition is grounded upon a series of incredible inferences drawn by the Petitioner from a distorted version of the facts of the case.**

The Petitioner's incredible Statement of the Case makes the conclusory, argumentative assertion that "Warren's sole aim was to demonstrate its 'superiority' by cornering the market, using the health inspection services as its vehicle, thereby preventing comparisons with the competition" (Pp7). Then, in particularizing this claim, Petitioner again improperly assumes the truth of its own conclusions in its allegedly factual references to "a monopoly in Roxbury," "special legislation in disguise," "non-complying tanks," "tell-tale evidence of lack of compliance" (Pp7), "false and fraudulent advertising," "massive campaign of vilification of petitioner's products," "business feudalization" (Pp8), "freight absorption," "corruption" (Pp9), "adulterated" products (Pp10), "preclusive ordinance", "wholesale exodus" (Pp12), etc. These scandalous epithets are the product of a series of fantastic inferences which the Petitioner has concocted from an unexcusably distorted remembrance of the actual facts of the case as they appeared from the evidence adduced at the trial.

While it is understandable that the conduct of the Petitioner's action, arising as it does out of alleged wrongdoing to the family business of Petitioner's counsel, would be highly charged with emotion and that this emotion would be intensified by the failure of the Petitioner's several pre-

vious attempts to seek redress of its alleged grievances in federal and state courts and administrative agencies (R122b-R127b), just as these circumstances do not excuse a counsel's continued use of ill-founded charges of fraud as a trial tactic when it is obvious that there is no basis in fact for such allegations, neither do they excuse the absolutely unwarranted assertions made in the Statement of the Case in the instant Petition when these assertions likewise have no foundation in the Record of the case. See *In re Woodmar Realty Company*, 294 F. 2d 785 (7th Cir. 1961), *cert. denied*, 369 U. S. 803 (1962); *Walters* v. *Chicago and North Western Railway Co.*, 216 F. 2d 332, 336 (7th Cir. 1954).

In order, therefore, to properly assess Petitioner's specious claims, it is first necessary to further correct in detail the facts as set forth in Petitioner's Statement of the Case and then to show that, based on such corrected facts, the inferences contended for by the Petitioner are absolutely unbelievable. In the interest of orderliness, the following argument is arranged generally in the same sequence of subject matter as appear in pages 7 through 12 of the Petition.

In connection with the motion adopted on March 19, 1953 ("the 1953 Motion") by the Local Board (Pp7), Dotolo testified that he knew nothing about the passage of the 1953 Motion prior to the Petitioner's litigation (R59b). He said only that as part of his customer solicitation he gave Mr. Grabovetz, a user of septic tanks, some advertising literature (R58b-R59b) which Grabovetz used for purposes of acquainting the Local Board with the details of the Keystone tank (T. 1131-T. 1132) when he suggested

and obtained approval for their use in Roxbury Township. Warren had absolutely no communication with Roxbury about the matter. Thus, there is no basis for the Petitioner's suggestion that Warren and Roxbury became "partners" in the adoption of "special legislation in disguise" to obtain a monopoly for Warren in Roxbury (Pp7).

Indeed, the 1953 Motion, coming at a time when only steel tanks and built-in-place tanks were allowed in Roxbury, was nothing more than a foresighted approval by the Local Board of a new type of septic tank which has now found approval and wide use throughout the entire State of New Jersey.

Similarly, there is no support in the Record for Petitioner's statement that Warren's tanks were found "more equal" than those of the Petitioner and others (Pp7).

Another assertion meant to mislead the court is that Warren installed 800 tanks in Roxbury (Pp7). Dotolo said 376 tanks (R67b) and there was no testimony to the contrary. These distortions in the Petitioner's Statement of the Case typify the tactics adopted by the Petitioner in its unceasing campaign to vilify and harass the Respondents.

As to Higgins' alleged "orders to accept only Warren's (round) tanks" (Pp7-Pp8), the citation to the transcript simply does not support the Petitioner's assertion. Moreover, Higgins" failure to keep records of his inspections supports no inference of wrongdoing on Warren's part. Indeed, Higgins said that he did inspect and reject Warren tanks on occasion (T. 996-T. 1006).

Regarding Warren's advertising brochures, the statement (Pp8) that they were in violation of criminal laws

is merely Petitioner's counsel's own conclusion. There is no citation by Petitioner to any judicial determination of criminality because one does not, of course, exist. In addition, Petitioner is on rather tenuous equitable ground in attempting to condemn Warren's brochures when Petitioner's own literature (Ex. P-13, R389a, T. 264) boasted "Byram Concretanks comply with Federal and State of New Jersey specifications." Since Petitioner's claims were undoubtedly grounded on the same type of conditional approval letters as Warren had received from the Federal agencies (R379a), who was more fraudulent in its advertising: Warren, who printed the entirety of the Government letters so that the public could see for itself the conditions attached to the Federal approvals, or Byram, who merely blandly claimed that it complied, without any hint that its compliance was a conditionally accepted one? Warren certainly admits that when the Government asked it to stop reproducing the Veterans Administration and Federal Housing Administration letters in its brochures, it complied with the request.

As to the inference (Pp8) that it was improper for the Warren brochure (Ex. P-11, R388a, R125a) to suggest that prospective septic tank users see their local health officer first, for tank size and other local requirements for septic tank systems, it is not clear to whom the Frankels would have such queries referred. Would it be the local dog-catcher?

The support cited for the stories of the "danse macabre," vilification of Petitioner's products, price wars, etc. (Pp8-Pp9), is the testimony of the incredible witness, Edmund, and no reasonable man would ask that it be digni-

fied by rebuttal. Suffice it to say that the testimony of Dotolo (R68b-R73b) and of the members of the Local Board (R74b-R75b, R77b, R80b, R87b-R89b, R90b-R91b, R102b) was to the contrary. As a matter of fact, even Edmund said that he "laughed" at the idea that Dotolo could make a distributor out of him (R173a, T. 415).

As to the veracity of the Petitioner's list of "lost customers," on cross examination Edmund admitted that he had never sold anything to 2 of the parties on his list and had never sold a septic tank to 8 others on the list (R44b-R55b). Moreover, Petitioner did not call as witnesses any of the "customers" so that they could testify as to whether in fact they did not buy from Petitioner because of the Roxbury situation or because the Petitioner's products were of poor quality. The omissions in the Petitioner's case are as glaring as the distortions.

As to "business feudalization" (Pp8), more warped comment comes from the Petitioner through its careful failure to refer to pertinent testimony. Dotolo explained the Sebolt agreement (Ex. P-10, R386a, R120a) in that during the period prior to 1955 when Warren was distributing Swarr's tanks in northern New Jersey, Sebolt was distributing Swarr's tanks in southern New Jersey. When Warren established its own production facilities in Saddle Brook, Sebolt, in the interest of business efficiency, merely used Warren instead of Swarr as its source of Keystone tanks (R284a, R286a-R287a). Sebolt had ceased making tanks long before Warren became a manufacturer (R292a-R293a), and Petitioner's remark that Warren succeeded in making distributors out of its manufacturing competitors (Pp8) is without foundation.

Similarly, Ackerman (R119a) did not capitulate to Warren (R293a, R67b-R68b), but it would be too much to expect that the Petitioner (Pb8) would stick to the proven facts of the case. In addition, there is nothing to support Petitioner's assertion that "Warren laid siege to Petitioner's market by ringing it with dealers" (Pp9). Warren's answer to interrogatory number 16(a) pertained to stockyards (R66b). Moreover, the interrogatories were answered in September 1960, long after the period involved in this suit.

As to freight absorption, the inference of condemnation (Pp9) is vitiated by the fact that the Petitioner engaged in the exact same practice in its marketing territory (R20b, R37b) and the Petitioner has cited no authority as to why freight absorption is permissible for it but not for its competitors when no restraint of trade results from either's actions.

Moreover, it should be kept in mind that Warren moved its plant to South Jersey in February-March 1959 (R57b). At that time, Petitioner, by its own omissions in failing to qualify its tanks under the 1958 Ordinance, was legally unable to sell tanks in Roxbury (R85b). Therefore, it had no potential sales in Roxbury which could be lost to Warren because of freight absorption or anything else. Since Edmund did not testify as to any lost sales outside of Roxbury, there were, thus, no sales losses of Petitioner subsequent to Warren's moving to South Jersey for which Warren could be held responsible.

Petitioner also attacks Warren's pricing system (Pp9) which is basically the same as that of the Petitioner.

Edmund testified that he had different categories of prices (R20b-R21b), that there were deviations from his regular prices, although he did not remember what they were (R37b), that he gave discounts for prompt payment and reduced prices to get business (R37b-R38b). Indeed, some of the Petitioner's citations (Pp9) (R145a, R146a) show simply that in certain instances the Petitioner's prices were exactly the same as Warren's (R21b-R22b). No cost justifications were given for Petitioner's prices. Again, there is no authority given as to why Petitioner's system was proper and Warren's improper.

The crowning absurdity comes in a scandalous charge wherein the Petitioner contends that Warren corrupted local officials (Pp9). True, Warren had a public relations program in which its salesmen acquainted public officials with its products. No law against this is cited by plaintiff.

The situation of the spinning machine royalties was explained by Dotolo and not challenged (R208a-R220a). Merely because Dotolo wouldn't speculate on the stand as to the exact amount of his expense monies gives absolutely no cause for an inference that these expenses were not all properly recorded in Warren's office. At least Dotolo knew that there were expense accounts; Edmund knew none of the financial details of his company (R22b-R24b). In addition, Petitioner misstates Warren's position as to cash sales (Pp9-Pp10). Dotolo admitted that although Warren's records did not distinguish between cash receipts and check receipts, Warren had had more than one cash sale (R63b).

Still, Petitioner's counsel has the bold audacity to suggest to this court that the Warren bribed the other Re-

spondents in this matter. And this in light of counsel's admission in open court that he had no direct evidence of bribery (R16b-R17b).

In talking about adulterated products (Pp10), the Petitioner has conveniently overlooked the testimony of its own witness from the New Jersey State Department of Health. Mr. Shaw stated that the State Department does not approve designs of septic tanks but only offers consulting services (R65b). Moreover, the Petitioner's own expert engineer, MacFayden, said that the interpretation of "precast reinforced concrete" is that reinforcement is needed at points where there will be stress (R92b). Since the State official testified that approvals of tanks come only from local Boards of Health (R65b) and since Warren's tanks were acceptable in all municipalities (R62b), it is obvious that the weight of authority differs from the Petitioner's conclusions regarding the compliance of Warren tanks with the State Standards. Moreover, there was no testimony that the claimed deviations of the Warren tanks from the State Standards had any deleterious effects upon the effectiveness of the Warren units as septic receptacles. As to the alleged short-sized tanks measured by Edmund, Dotolo admitted to the possibility of human error in his company's operations (R221a). The Petitioner apparently denies that it is subject to such fallibilities.

In addition, in its obtuse Appendix D (Pp38-Pp40), allegedly dealing with Warren tank violations, Petitioner has (1) conveniently omitted section 5.6 (f) which provides that septic tanks may be constructed of any material approved by the local board of health (Ex. P-16,

R401a, T. 268), (2) failed to note that section 5.11 in using the word "width" rather than "diameter," deals with rectangular tanks rather than round tanks and (3) similarly overlooked a twenty-four inch manhole in the top of Warren's tanks (Ex. P-3, R380a, T. 631).

The inference apparently suggested to be drawn from pages 7 through 12 of the Petition, is that Warren is responsible for the loss of Petitioner's "customers". However, it should be noted that Edmund did not cite any particular instances where Warren allegedly caused him to lose sales other than in Roxbury Township. Indeed, its own witness stated that Petitioner's tanks had been installed all over the area (R92b)—Petitioner's area being within 20 miles of its plant (R33b-R36b).

As to Petitioner's sales outside of Roxbury Township, the obvious reasons, among others, why, if it is in fact true, Petitioner has found less success than Warren are: (1) Petitioner has no effective sales program; its sales efforts are conducted solely by Edmund who also doubles as tank maker, repairman, truck-driver, etc. (R27b-R31b); whereas Warren has a regular sales force (R56b-R57b); (2) Edmund, ostensibly the chief executive officer of the Petitioner, has absolutely no knowledge of the office and financial affairs of his company (R23b-R24b, R26b-R27b); indeed, it is conceivable that one reason why the Petitioner's prices are allegedly higher than those of Warren is because of inefficiency and mismanagement in Leopold's office over which Edmund has no control; Warren, on the other hand, divided its responsibilities so that one principal handled production and the other handled sales and all other details (R56b); (3) Petitioner has a bad reputation in the trade

in that after delivering a broken tank it refuses to replace same and then commences suit for the sales price of the broken tank (R98b); wherens Warren replaces tanks on which complaints are received (R221a-R222a).

As to Petitioner's efforts in Roxbury, if there was any merit to its claims that its tanks were arbitrarily rejected (Pp11-Pp12), why did it not take the matter up with the Local Board (R39b-R42b), why did it not pursue its action in the state court rather than failing to prosecute that suit, why did it not submit sufficient data under the 1958 Ordinance to qualify its tanks (R85b)? Moreover, what kind of a concrete tank monopoly would have allowed one-half of Roxbury's septic tank installations to be of steel construction (R364a-R366a, R100b-R101b) would have allowed the competing tanks and products of the Petitioner (R38b-R39b, R43b-R44b) and three other concrete tank makers (R101b) to be installed, and would also have allowed Warren tanks and products to be rejected (R99b-R100b, R102b)?

In sum, Petitioner's business failures are well shown to be of its own making and not the work of anyone else.

Similarly, the inferences that franchise dealer contracts (such as that between Warren and Sebolt), non-franchised dealerships, product stockpiling in strategic market areas and public relations programs are not a commonplace in American industry, only demonstrate again the Petitioner's marketing naivete. If Edmund had spent more time tending to business and less time carrying out ill-advised counsel to settle petty disputes in an anti-trust action, he might well have been in a better competitive position today.

As an afterthought, Petitioner seems to suggest that there was some impropriety in Dotolo's and Dunkle's sale of all or a portion of their interests in the Warren Companies (Pp12). Is it seriously contended that this, too, is prohibited by law?

Thus, the Petitioner would have this court draw from the evidence in the trial court certain inferences to support its charges of a monopoly and conspiracy to restrain trade in the sale of septic tanks, since, without these inferences, the Petitioner has not made out a prima facie case for relief. However, even upon the most elementary analysis, the facts shown by the evidence do not at all approach supporting the inferences urged by the Petitioner. Indeed, taking the Petitioner's fallacious Statement of the Case as true, the evidence recited tends, at best, equally to sustain either of two inconsistent inferences. Under such circumstances, the inferences argued for by the Petitioner cannot be held to be established. *Schad* v. *Twentieth Century-Fox Film Corporation*, 136 F. 2d 991, 996 (3d Cir. 1943); *Dipson Theatres* v. *Buffalo Theatres*, 86 F. Supp. 716 (W. D. N. Y. 1949), *aff'd*, 190 F. 2d 951 (2d Cir. 1951), *cert. denied*, 342 U. S. 926 (1952).

## POINT II.

**No important question of federal law is involved here.**

Very simply, this case turns on the District Court's determination that the Petitioner's evidence and the inferences fairly supported by its evidence did not show a prima facie case for relief. What was here involved was a

unique set of alleged factual circumstances which are unlikely to ever arise again. Thus, Petitioner's claims of a "question of great public importance" (Pp14) are wholly without merit and there is no warrant for review by this Court on certiorari.

Indeed, Petitioner's penchant to create issues out of whole cloth is further illustrated in the instant Petition by the feigned argument that the Third Circuit based its affirmance on a theory of collateral estoppel or res judicata (Pp19-Pp21). Of course, there was no reference to the prior State Suit in the District Court's letter opinion (Pp31-Pp33), and the Third Circuit's remarks about the earlier case (Pp35) were merely in the nature of a historical reference.

## POINT III.

**The decision below was clearly correct and was not in conflict with other decisions or with applicable law.**

### A. The Petitioner's case was properly dismissed by the Trial Court.

As to Petitioner's claim of a deprivation of jury trial (Pp17-Pp19), suffice it to say that the rule of this Court regarding review of trial evidence, e.g., *Continental Ore Co.* v. *Union Carbide Corp.*, 370 U. S. 690, 696 (1962), is followed precisely by the Third Circuit. *O'Brien* v. *Westinghouse Electric Corporation*, 293 F. 2d 1 (3d Cir. 1961). Moreover, there is, of course, no dispensation for antitrust plaintiffs from the effects of Rule 41(b) of the Federal Rules of Civil Procedure. See, e.g., *Independent Iron Wks., Inc.* v. *United States Steel Corp.*, 177 F. Supp. 743 (N. D. Cal. 1959).

**1. As a matter of law, the Petitioner did not make out a prima facie case of a violation of Sections 1 or 2.**

In the instant situation, the Petitioner alleges a conspiracy between the Roxbury Respondents on the one hand and the Warren Respondents on the other hand. The Roxbury Respondents, consisting of a municipal board of health, its members and the township sanitary inspector, had, of course, no official power to act outside of Roxbury Township. Therefore, the effective area of this conspiracy is limited to Roxbury Township; the Warren Companies' operations outside of Roxbury Township have no relevance to the alleged violation of Section 1, since no contract, combination or conspiracy concerning Warren and any non-Roxbury co-conspirator has been specified by the Petitioner in its charges (R12a), and a corporation cannot conspire with itself to violate Section 1. *Cott Beverage Corporation v. Canada Dry Ginger Ale*, 146 F. Supp. 300 (S. D. N. Y. 1956), *appeal dismissed*, 243 F. 2d 795 (2nd Cir. 1957).

The Petitioner offered absolutely no proof of any contract, combination or conspiracy between the Roxbury Respondents and the Warren Respondents. Instead, it took the almost comical position of asking that such a combination or conspiracy be inferred from the mere fact that the Warren Companies sold their tanks freely in Roxbury Township whereas the Petitioner had some difficulty in selling its tanks there.

As evidence of the preposterousness of the Petitioner's position, none of the Section 1 and Section 2 cases cited by Petitioner in its brief (e.g., Pp16, para. 3) have the vaguest similarity or relevance to the facts of the instant suit. The principal and crucial distinction is that in the cases cited

by the Petitioner the alleged co-conspirators were persons who stood to profit business-wise as a result of the conspiracy.

Not so in the cause at bar.

The Roxbury Respondents are not in the septic tank business and the success or failure of the Petitioner is of no commercial interest to them. Thus, in an attempt to show a consideration passing to the Roxbury Defendants for their participation in Warren's alleged conspiratorial activities, Petitioner scandalously claims that Warren bribed the Roxbury Defendants.

But, the Petitioner's redress against bribery is under the criminal laws of New Jersey, rather than under the subject anti-trust acts.

However, not only has Petitioner never lodged criminal bribery charges against the Respondents, but more important, at the time of trial, nearly three years after the commencement of this action, the Petitioner admitted that it had no direct evidence of such bribery (R16b-R17b).

Moreover, the proofs did not show that any dealings the Warren Respondents had with the Roxbury Respondents were illegal or improper. Thus, there was no logical or reasonable inference of conspiracy that could be drawn from the evidence presented by Petitioner. *Independent Iron Wks., Inc. v. United States Steel Corp.*, 177 F. Supp. 743 (N. D. Cal. 1959).

The facts of the instant case are so far removed from constituting a cause of action under Section 1, that the Respondents clearly merited the summary relief granted

by the District Court at the conclusion of the presentation of the Petitioner's evidence.

Similarly, there was no marking out of a relevant market area or any proof that Warren by itself had any power to control prices or exclude competition as would make a prima facie case under Section 2. See *United States* v. *E. I. DuPont de Nemours & Co.*, 351 U. S. 377 (1956). Indeed, there was no evidence at all to show that Warren's progress in the septic tank industry was not fairly and honestly achieved.

**2. The evidence did not show any injury to Petitioner which was proximately caused by the Respondents.**

In an anti-trust action, the burden is on the Petitioner "to prove an injury to either his business or property of which the conduct of the defendant was the proximate cause". *Dollac Corporation* v. *Margon Corporation*, 164 F. Supp. 41, 65 (D. N. J. 1958), *aff'd* 275 F. 2d 202 (3d Cir. 1960). In the instant case, there was no evidence that any loss suffered by the Petitioner was caused by Warren.

Indeed, Edmund admitted that metal tanks were sold in his area (R60a). Interestingly, though, he gave no reasons why, if Warren was put out of the septic tank market, the void would not be filled by metal tanks rather than Petitioner's tanks. Moreover, the Petitioner's entire case failed to show why any competitive losses it might have suffered were not due to metal tanks rather than Warren products.

Thus, since there was no evidence that any loss suffered by Petitioner was caused by Warren, the trial court properly rejected Petitioner's attempt to prove a loss of hy-

pothetical profits (Pp27, para. a). *Talon, Inc.* v. *Union Slide Fastener, Inc.*, 266 F. 2d 731, 736-38 (9th Cir. 1959); *Wolfe* v. *National Lead Company*, 225 F. 2d 427 (9th Cir. 1955), *cert. denied*, 350 U. S. 915 (1955).

The law is that Petitioner is required to prove that " 'as a result of defendants' acts, damages in some amount susceptible of expression in figures resulted' ". *Herman Schwabe, Inc.* v. *United Shoe Machinery Corp.*, 297 F. 2d 906, 909 (2d Cir. 1962), *cert. denied*, 369 U. S. 865 (1962). " 'The jury may not render a verdict based on speculation or guesswork.' " *Id.* at 910.

As in *Schwabe*, the Petitioner sought to prove damages through an expert statistician (Pp27). However, also as in *Schwabe*, there was no basis established for the expert's assumptions. There was nothing to support the premise that but for the Respondents' unlawful acts the Petitioner would have gotten any specific additional share of the septic tank market beyond that which it actually enjoyed.

Thus, Ex. P-43 (R415a) was properly excluded by the trial court. *Herman Schwabe, Inc.* v. *United Shoe Machinery Corp., supra*, at 912. An additional infirmity in Ex. P-43 is that it assumes that every new home owner in the area would have made inquiry of the Petitioner about a septic tank. Hardly a likely prospect.

Also, the cases cited by Petitioner concerning damages (Pp16, para. 4) are inapposite since they deal principally with situations where the wrong or liability under the antitrust acts was established and the remaining issue was simply the quantum of the plaintiff's monetary recovery. In the case at bar, of course, the question of damages is not

reached because the Petitioner in the first instance did not show any wrong cognizable under the anti-trust acts.

In sum, Petitioner has wholly failed to show:

(1) a violation of the anti-trust laws and

(2) damages to Petitioner proximately resulting from the acts and conduct of the Respondents which constitute the violations. *Shotkin* v. *General Electric Co.*, 171 F. 2d 236 (10th Cir. 1948).

> "* * * the use of conventional anti-trust language in drafting a complaint will not extend the reach of the Sherman Act to wrongs not germane to that act, even though such wrongs be actionable under state law. We are not concerned with labels. Otherwise, an adroit anti-trust lawyer might use his skill in the use of words to convert many unlawful acts into anti-trust violations. The anti-trust laws were never meant to be a panacea of all wrongs". *Parmelee Transportation Company* v. *Keeshin*, 292 F. 2d 794, 804 (1961), *cert. denied*, 368 U. S. 944 (1961).

On the facts, the trial court's decision was manifestly correct.

**B. The Trial Court's rulings on discovery and evidence matters were made properly within its discretion.**

**1. Pretrial discovery.**

As to Petitioner's claims of error in the trial court's rulings on pretrial discovery issues (Pp22-Pp25), of course, an appellate court does not review discretionary rulings of the trial court, unless the latter's discretion has been clearly and prejudicially abused. 5A C. J. S. *Appeal & Error*, sec. 1583 (1958).

In ruling on pretrial discovery issues, a heavy burden weighs on the District Court to strike a delicate balance between two competing interests:

(1) the current tendency toward broadening the ambit of the anti-trust laws. e.g., *Continental Ore Co.* v. *Union Carbide Corp.*, 370 U. S. 690 (1962); *Klor's* v. *Broadway Hale Stores*, 359 U. S. 207 (1959); *Moore* v. *Mead's Fine Bread Co.*, 348 U. S. 115 (1955), which restricts Federal courts, on summary pretrial motions for dismissal or judgment, from disposing of any complaint brought under the anti-trust laws, no matter how small and localized is the underlying dispute, so long as there is even the most minute possible connection of the matter with interstate commerce; and

(2) the court's obligation to prevent untrammeled pretrial fishing expeditions where on the available record the plaintiff's claim appears to be insubstantial. *Waldron* v. *British Petroleum Co., Ltd.*, 4 F. R. Serv. 2d 30b.23, Case 1 (S. D. N. Y. 1961).

Of course,

> "each case where an inspection of books of accounts is resisted on the ground that it will disclose confidential information to a competitor is sui generis." *Service Liquor Distributors, Inc.* v. *Calvert Distillers Corporation*. 16 F. R. D. 513, 514 (S. D. N. Y. 1955).

Although Petitioner's Appendix filed in the Third Circuit did not include the pertinent motion or any affidavit of good cause, see 4 Moore, Federal Practice, para. 34.07, at 2442-2443 (2d ed. 1962), even assuming that the same were properly filed, there was no error in the District Court's denial of the Petitioner's requested inspection of

documents, since the parties were competitors and the inspection of Warren's delivery tickets would have revealed the names of its customers, and its confidential data concerning its customers, to the Petitioner which would have irretrievably injured Warren's competitive position (R9b-R11b, R13b). Under such circumstances the Petitioner had no untrammeled right to discovery. *Hartley Pen Co.* v. *United States District Court, etc.*, 287 F. 2d 324 (9th Cir. 1961); *Service Liquor Distributors, Inc.* v. *Calvert Distillers Corp.*, 16 F. R. D. 513 (S. D. N. Y. 1955); *Service Liquor Distributors, Inc.* v. *Calvert Distillers Corp.*, 16 F. R. D. 344 (S. D. N. Y. 1954).

Moreover, according to Petitioner, its sole purpose in attempting to examine the delivery tickets was to look for "cash" sales (Pp22). In addition, although denied by the Warren Respondents, Petitioner's attorney claimed that it knew all of Warren's customers (Transcript on Motions, Monday, January 23, 1961, filed May 29, 1961, pp. 28-29). Therefore, all Petitioner had to do to get the information it sought was to interview these customers.

> "'Good cause is not shown where the moving party has the information sought or can obtain the documents or information without recourse to the discovery rules.'" *Korman* v. *Shull*, 184 F. Supp. 928, 934 (W. D. Mich. 1960), *appeal dismissed*, 310 F. 2d 373 (6th Cir. 1962).

As to Petitioner's suggestion that the court should have allowed "partial discovery by the method of sampling a representative month's delivery tickets" (Pp23), the Record does not indicate that Petitioner ever made such a proposal to the trial court.

Finally, the gross inadequacy of Petitioner's proofs during the plenary trial clearly evidences the wisdom and farsightedness of the Trial Court's limitations on the Petitioner's pretrial discovery efforts. For, had the Petitioner been allowed untrammeled freedom to run rampant with its discovery, the Warren Companies, merely on the foundation of a baseless and unwarranted complaint, might have had to reveal their customer lists, customer redit data and customers' usage requirements, the fruit of Warren's many years of hard labor, to a competitor who theretofore, to all observations, had not been willing to invest the effort to develop for itself the business asset of a valuable customer list. The District Court must be allowed some discretion to sense the aura of a suit and when it finds that charges of bribery, corruption and fraud are lightly tossed about by a Petitioner with a penchant for litigation, the Trial Court's exercise of a nice degree of pretrial discovery protection for the Respondents is laudable. The courts and their discovery rules are meant to be used to do justice; when a party is inclined to use them for other purposes, special vigilance by the trial judge is imperative. See 4 Moore, Federal Practice, para. 34.10 at 2460 n. 11 (2d ed. 1962).

**2. Trial evidence.**

Similarly, the District Court's discretionary rulings on evidence matters during the trial were exercised within normal limits and should not be disturbed. *Brigham Young University* v. *Lillywhite*, 118 F. 2d 836 (10th Cir. 1941), *cert. denied*, 314 U. S. 638 (1941). Indeed, Petitioner's proclivity to bring in irrelevant, opinionated and other-

wise wholly improper matters placed great burdens on the District Court in order to keep the trial within manageable bounds.

As illustrations of the correctness of the trial courts' rulings, testimony as to what Petitioner's customers might have told Edmund (Pp28, para. b.) was properly excluded, *Buckeye Powder Co.* v. *Dupont de Nemours Powder Co.*, 248 U. S. 55, 65 (1918); collateral matters (Pp42, item 1) were rightly kept out, *Park Neponsit Corporation* v. *Smith*, 258 F. 2d 452 (1st Cir. 1958); and conclusory statements were appropriately prohibited (Pp43, item 12), *Hillside Amusement Co.* v. *Warner Bros. Pictures, etc.*, 224 F. 2d 629 (2d Cir. 1955). In other instances (e.g., Pp28, para. c; Pp42, item 4), Petitioner made no offer of proof; in still others (e.g., Pp43, item 8; Pp43, item 11), nothing was presented to the trial court to act upon and, of course, there is nothing in the trial transcript concerning any rulings made by the court.

**3. Subpoena duces tecum.**

Regarding the subpoena duces tecum (Pp28-Pp29), such a subpoena is properly quashable if it is unreasonable and oppressive. Thus, as in the instant case, where a Petitioner fails to take advantage of pretrial discovery and inspection proceedings and leaves until the time of trial a demand to produce a vast number of documents which will take considerable time to compile, a subpoena will be quashed. *United States* v. *Watchmakers of Switzerland*, 27 F. D. R. 513 (S. D. N. Y. 1961), *United States* v. *E. I. DuPont de Nemours & Co.*, 14 F. R. D. 341 (N. D. Ill. 1953). Similarly, the list of documents may of itself indicate unreasonable-

ness or oppression. *In re Grand Jury Investigation (General Motors Corp.)*, 174 F. Supp. 393 (S. D. N. Y. 1959).

A Petitioner's counsel bringing lightly founded charges of bribery, corruption and fraud should well expect a trial court to be most diligent in its efforts to protect the Respondents from harassing discovery efforts. Therefore, such a Petitioner is inviting a blanket protective order when in a subpoena duces tecum which covers one or two proper items it also includes a multitude of improper items. A burden of great care to not improperly use the processes of the court is cast upon such a Petitioner and it cannot expect to submit a substantially offensive subpoena to the court and ask it to pick out the one or two allowable items from a great morass.

Moreover, the trial court necessarily has great discretion in determining whether the harmful effects to one party of a subpoena duces tecum outweigh its beneficial effects to another party. Cf., *Application of Consumers Union of United States, Inc.*, 27 F. R. D. 251 (S. D. N. Y. 1961); *Thomas* v. *Hanover Steamship Corporation*, 183 F. Supp. 537 (D. Md. 1960). The trial judge's ruling should not be disturbed unless it clearly appears arbitrary. *In re Manufacturers Trading Corp.*, 194 F. 2d 948 (6th Cir. 1952).

As to some of Petitioner's individual claims of error:

(1) The purpose of the request for delivery tickets (Pp28) was to see if the delivery tickets showed cash sales by the Warren Companies. If so, the Petitioner would ask the jury to infer that any such cash sale receipts were turned over by the Warren Respondents to the Roxbury Respondents as bribery payments (R75a-R81a). The trial

court quite properly found the Petitioner's position to be preposterous but nonetheless granted leave to the Petitioner to renew its application if the Petitioner produced any additional, affirmative proof of Warren's bribery of the Roxbury Respondents (R81a). Petitioner never did renew its application. Moreover, Dotolo later admitted that although Warren's records did not distinguish between cash receipts and check receipts Warren had had more than one cash sale (R63b). Thus, for whatever Petitioner might think that its suggested inference was worth, the foundation facts were laid by Dotolo's testimony, the production of the delivery tickets would, therefore, have been surplusage and the trial court's ruling should not be disturbed, especially in view of the competitive situation of the parties and Petitioner's counsel's stipulation that it had no right to learn who Warren's customers were (R64b). In addition, contrary to the Petitioner's statements at Pp6 and Pp23, Judge Meaney never ruled during the pretrial motions as to what books and records the Respondents would be required to produce at the trial.

(2) Dotolo was a named Respondent and was obviously testifying on his own behalf. The subpoena request for corporate documents (Pp28) bears every indication of being an integral part of the Petitioner's continuous efforts to conduct a fishing expedition in the Respondents' affairs.

(3) The court's ruling regarding Warren of Pennsylvania documents (Pp28) was harmless since Dotolo later testified that Warren paid royalties on a basis of less than the total number of tanks it produced (R208a-R210a, R212a-R220a). Therefore, the basis for the Petitioner's absurd inference (R214a) was laid without the necessity for the production of the requested documents.

## Conclusion.

**For the foregoing reasons it is respectfully submitted that the Petition for Writ of Certiorari should be denied.**

Respectfully submitted,

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April 10, 1964.